DANGEROUS OFFENDERS: AN ANALYSIS OF JUDICIAL SENTENCING DECISIONS

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ABSTRACT

Objective: The present study explored Dangerous Offender (DO) judicial sentencing decisions in Canada by examining judicial decision maker's written comments regarding a) experts' ratings of risk, treatment amenability, and risk management in the community, b) partisanship, c) experts' discussion of static, dynamic, and protective factors, d) the effect of the 2008 legislation change, e) ethnicity, and f) jurisdictional differences. **Method:** The study was archival and retrospective. There were 140 written sentencing decisions identified in four Canadian provinces (BC, AB, SK, and MB) via CanLII (publicly accessible) between July 2, 2008 and July 2, 2018. **Results:** Results indicate that the judicial decision makers' interpretation of experts' ratings of risk, treatment amenability, and risk management in the community were strongly associated with and significantly contributed to penalty outcomes. Generally, the trend that appeared was that the judicial decision makers' interpretation of lower risk ratings, higher ratings of treatment amenability, and higher risk manageability in the community resulted in a much lower likelihood a Defendant would receive an indeterminate sentence. Moreover, the results suggest that the judicial makers' note a substantial amount of agreement on all three assessment areas when multiple experts are present. The judicial decision makers' interpretation of the experts' discussion of static, dynamic, or protective factors was not influential on outcomes. The 2008 legislation change appears to contribute little in terms of the designation stage but has influenced the penalty stage. Further, Defendants with an Indigenous heritage now have a 50% chance of receiving an indeterminate sentence compared to 84% prior to the legislation change. Saskatchewan continues to have not only a disproportionate number of DOs but also DOs of Indigenous heritage. The results indicate that BC, AB, and MB have not changed their penalty patterns significantly since the 2008 legislation change, but Saskatchewan has. **Discussion:** Results generally supported previous research indicating that the judicial decision makers' interpretation of expert risk assessments influence preventative detention hearings and that partisanship continues to exist even though legislation changes have attempted to reduce it. Results also indicated that the 2008 legislation change has had an impact on penalty outcomes but not designation outcomes. Moreover, although Indigenous peoples are disproportionately represented, under the 2008 legislation change, they are as likely to receive a determinate sentence with an LTSO as an indeterminate sentence. Implications of the results are discussed in terms of the validity and application of special sentencing designations in Canada.

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Abbreviation	Explanation
ANOVA	Analysis of Variance
DO	Dangerous Offender
DSO	Dangerous Sexual Offender
GPCSL	General Personality and Cognitive Social Learning
HCR-20	Historical Clinical Risk-20
HO	Habitual Offender
ICC	Intraclass Correlation Coefficient
LS/CMI	Level of Service/Case Management Inventory
LSI-R	Level of Service Inventory-Revised
LTO	Long-Term Offender
LTSO	Long-Term Supervision Order
PCC	Psychology of Criminal Conduct
PCL-R	Psychopathy Checklist-Revised
RNR	Risk-Need-Responsivity
SIR	Statistical Information on Recidivism
SORAG	Sex Offender Risk Appraisal Guide
SPJ	Structured Professional Judgment
SCC	Supreme Court of Canada
VRAG	Violence Risk Appraisal Guide
VRS	Violence Risk Scale

Note: All abbreviations listed also have explanations included in text as they appear. The list includes alphabetized abbreviations that occur more than once in the text.

CHAPTER 1: LITERATURE REVIEW

1.1 General Overview

Generally, it has been found that a small number of people are responsible for a significant proportion of violent crime. Hence, Canada introduced preventative detention legislation in an attempt to address individuals who committed chronic violent offences that posed a threat to the public (Bonta et al., 1998). Forms of this legislation have been in place since the late 1940s and currently involves individuals involved in the criminal justice system meeting particular criteria to receive special sentencing designations, either as a dangerous offender (DO) or a long-term offender (LTO) (Valiquet, 2008). As of the end of the fiscal year 2018-2019, statistics show that the number of DOs in Canada continues to rise (Public Safety Canada, 2020).

However, evidence also indicates that the DO population is not significantly different regarding its risk level compared to released correctional populations not carrying a special sentencing designation (Koopman, 1985; Nicholaichuk et al., 2013) or carrying a long-term sexual offender designation (Trevethan et al., 2002). Moreover, when measuring six primary clinical factors, there was no significant difference between DOs and others who committed violent and sexual offences (Thompson, 2016).

Risk assessment is now a standard tool in both pre-sentence and post-sentence reports, and are implicitly or overtly presented as factual data to be measured by legal-sentencing criteria in judicial decision making (Bloomenfeld, 2007). Both legal professionals and academics have consistently voiced skepticism with current risk assessment practices which, it is said, do not adequately capture the realities of risk-management and future rehabilitation. Instead, they focus on the individual's history and past conduct (Thompson, 2016). Risk assessment plays a dual role in the context of a DO hearing – such evidence can be presented to both establish risk at the designation stage, and also to interpret the reasonable expectation of control at the penalty stage (Thompson, 2016).

Assessment of risk largely depends on expert witnesses who may utilize different types of risk assessment tools to predict the risk of recidivism and the extent to which it can be managed (Thompson, 2016). There is a significant amount of research that suggests actuarial assessment tools (utilizing static risk factors only) cannot adequately determine the management of an individual's risk under a long-term supervision order (LTSO), or other community

initiatives (Thompson, 2016). An equally substantial body of research exists suggesting experts have improved their accuracy and consistency in assessing risk, most times to the point of finding significant correlations (Thompson, 2016).

Preventative detention legislation in Canada specifies that an expert risk assessment is required in making preventative detention recommendations. Moreover, although the field of risk assessment has improved dramatically within the last few decades, limitations regarding how risk information is presented and interpreted still exists. Despite these limitations, assessments provided by experts are the primary source of information available to judicial decision makers when assessing the risk and possible management of individuals undergoing a preventative detention hearing. Evaluating judicial decision makers' reliance on experts is particularly important given that recent research has questioned the reliability of risk assessment scores presented within real-world contexts.

1.2 Theoretical Underpinning

Over the past 20 years, significant changes in the theoretical frameworks that are prominent in the fields of criminal justice and criminology evidence a shift towards a better understanding of the criminal conduct of individuals (Andrews & Bonta, 1998; Andrews et al., 1990; Andrews et al., 2006). A shift is also occurring from theories that aim to explain differences between individuals to those that explain within-individual differences. Theories that focus on between individual differences try to explain why some individuals commit crime and others do not. However, these explanations tend to be static, or unchanging. In contrast, theories looking at within-individual variation look at changes over time in the criminal behavior of individuals within the criminal justice system and are more dynamic (Farrington, 2003).

The Psychology of Criminal Conduct (PCC) is a validated framework that attempts, amongst other things, to identify individual dynamic (or changeable) factors that correlate with criminal behavior, which could act as potential targets for treatment or intervention (Bonta & Andrews, 2017). The dynamic factors become relevant for assessing areas of need and risk for recidivism. The PCC and the development of risk assessment tools utilizes a General Personality and Cognitive Social Learning (GPCSL) theory, which speaks to the eight major psycho-social-biological factors that influence and maintain criminal behaviour (Bonta & Andrews, 2017). The Central Eight factors are criminal history, pro-criminal attitudes, pro-criminal associates, antisocial personality patterns, family/marital, school/work, substance abuse, and

leisure/recreation (Bonta & Andrews, 2017). Of importance, seven of the eight factors are dynamic (or changeable over time), which is crucial as it speaks to an individual's ability to change (Bonta & Andrews, 2017). From the GPCSL theory came the Risk Need Responsivity (RNR) model, which has become the dominant model of offender assessment and treatment in the world (Cullen, 2012, Polaschek, 2012; Taxman et al., 2014; Ward et al., 2007).

The Risk Principle identifies "who" should be the focus of supervision and treatment services. It states that the assessed level of risk should be an indicator of the amount of supervision or treatment an individual receives (Bonta & Andrews, 2017). Individuals assessed as high risk should receive more intensive services (Andrews et al., 1990). Also, research has shown that the relationship between risk and treatment intensity (e.g., minimal or intensive) challenge the perspective that any treatment is better than no treatment (Bonta & Andrews, 2017). The Need Principle states that the targets of correctional intervention should be those areas of need that are related to recidivism, or that have some relationship to criminal behavior, also called criminogenic needs (Andrews et al., 1990; Bonta & Andrews, 2017). Criminogenic needs are attributes of an individual that, when changed, are associated with changes in the odds of recidivating. Also, not all needs are criminogenic and targeting non-criminogenic needs should not be expected to impact criminal behavior. The Responsivity Principle refers to the responsiveness of the individual to different service options. It recognizes that the impact of various treatment approaches may vary across individuals. The style and mode of service an individual receives should be matched to the learning style of the individual so that their criminogenic needs are targeted in a way that they will benefit from (Andrews et al., 1990; Bonta & Andrews, 2017).

Studies demonstrate that adherence to the principles of the RNR model leads to improved criminal justice outcomes and reduced recidivism (Andrews & Dowden, 2006; Bonta & Andrews, 2017; Lovins et al., 2007; Lowenkamp et al., 2006). Service delivery to individuals who are at higher risk produces more substantial decreases in recidivism than for individuals who are lower risk, as long as the treatment focuses on criminogenic needs and adheres to effective treatment strategies. When imposing conditions of supervision, it is appropriate that the conditions reflect the targeting of criminogenic needs and specific responsivity factors in the individual case (Andrews & Dowden, 2007).

1.3 Sentencing in Canada

A definition of sentencing includes the imposition of a legal sanction on persons convicted of a criminal offence (Pozzulo et al., 2009; Roberts, 2004). There is no single purpose or objective to sentencing individuals within the criminal justice system. When sentencing an individual, a judicial decision maker has to consider the overall objective and decide which is most appropriate in each specific case. Section 718 of the *Criminal Code* (1985) states, amongst other objectives, that "[T]he fundamental purpose of sentencing is to protect society…" (p. 886). Moreover, the "fundamental principle" of sentencing guides judicial decision makers, by stating that "a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender" (*Criminal Code*, 1985, p. 887).

Beyond the fundamental principle, the *Criminal Code* (1985) also consists of other sentencing principles under Section 718.2, including but not lmited to, "(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate…, and (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm [done]…should be considered for all offenders..." (*Criminal Code*, 1985, pp. 887-9). In addition to deciding which purpose is most important, judicial decision makers are required to select a specific sentence that will fulfil the sentencing objective. Canadian judicial decision makers have a wide range of sentencing options available to them (Roberts, 2004).

1.4 Preventative Detention in Canada

1.4.1 Early Legislation and Calls for Reform

The idea of indefinitely incarcerating individuals was conceptualized more than 70 years ago, and the first enactment of legislation (i.e., habitual offender (HO) legislation) in 1947 occurred on the recommendation on the Archambault Commission (Valiquet, 2008). The purpose of the HO legislation was to remove individuals who committed persistent, chronic offences from society for a significant period (Canadian Committee on Corrections, 1969). If designated a HO, individuals were subject to an indeterminate sentence and reviewed annually.

The enactment of Section 662 of the *Criminal Code* (1985) in 1948 added a category of designation – the dangerous sexual offender (DSO) section. This section targeted individuals who behaved sexually, showing a failure to control their sexual impulses and thereby likely to cause injury, pain, or other evil to any other person or is likely to commit a further sexual offence (Canadian Committee on Corrections, 1969). Just as an HO, the DSO could receive a

preventative indeterminate sentence. The new provisions required that any DSO application had to be supplemented with testimony from a minimum of two psychiatrists; one approved by the Attorney General and the other by the Defendant (Canadian Committee on Corrections, 1969).

For more than a decade, the HO and DSO regimes remained unchanged but were the subject of considerable criticism. In 1960, in response to difficulties around meeting the legal standard of proof and a lack of clear direction regarding the definition of a DSO (Petrunik, 1994), the provisions were amended. Changes to the legislation included eliminating the determinate component of sentencing that had been permitted under Section 660 of the *Criminal Code* (1985) and also allowed for an individual to be designated as a DSO after only one conviction (MacAlister, 2005).

Despite the 1960 amendments, concern about the HO and DSO provisions continued into the 1980s. In particular, attention was drawn to the errors made by mental health experts in accurately diagnosing mental disorders (in particular, psychopathy) (Petrunik, 2002). During this period, two federal government committee reports were generated. First, the Canadian Committee on Corrections (Ouimet Report) (1969) found that the HO legislation had not been applied uniformly in a rational manner across the country. The committee stated that because the legislation had not been applied consistently, the deterrent effect of the HO and DSO legislation was "insignificant." It was recommended that the legislation be repealed as it was too broad in scope and was being applied to non-DOs.

Second, The Standing Committee on Legal and Constitutional Affairs (Goldenberg Report) (1974) was released five years after the Ouimet Report (1969). The committee's mandate involved a complete examination of the parole system in Canada. The Goldenberg Report (1974) recognized the conclusion that the HO and DSO legislation was capable of being applied against individuals who were not dangerous. One recommendation suggested that the legislation should be repealed and replaced by a more general DO legislation, which would explicitly set out criteria for the identification of DOs and a mechanism for the assessment. The Goldenberg Report (1974) also recommended that any new DO legislation should allow for indeterminate sentences (as did the HO and DSO legislation).

The revised DO scheme first came into force in 1977 and has undergone significant amendments on two occasions. The first was in 1997 and then again in 2008. Ultimately, these amendments have resulted in the broadening of the application of the DO provisions.

1.4.2 1977: Laying the Framework of Part XXIV

The *Criminal Law Amendment Act, 1977* continued to form the basis of the current DO scheme used by Courts. Applications were initiated by the Crown after obtaining the consent of the Attorney General, at which time the application was filed with the Court. As in 1960, two psychiatrists were required to give evidence, while a criminologist was optional (MacAlister, 2005). As long as all the criteria in the statute were met, the Court would declare the individual as a DO, and the Court then had to provide an indeterminate sentence (MacAlister, 2005). All indeterminate sentences were subject to review after three years from the date of sentence and, if the individual was not released after the initial three years, their imprisonment was subject to review by the Parole Board of Canada every two years after that (Connelly & Williamson, 2000).

1.4.3 1997: Introduction of the Long-Term Offender Regime

The DO legislation remained the same for 20 years until significant amendments occurred in 1997. Although the framework was not entirely overhauled, the amendments resulted in very significant changes, including the introduction of a new designation – the LTO (Manson, 2001). Changes were also made to the provisions involving psychiatric testimony, wherein only one assessment would be required (MacAlister, 2005). This change was based on a recommendation of the Task Force on High-Risk Violent Offenders, which recommended one multi-disciplinary neutral assessment team, with the aim of avoiding partisanship. However, Manson (2001) notes two problems with this approach; first, it cannot be said that there is a comparable multi-disciplinary clinic in every Canadian jurisdiction, and second, psychiatrists and psychologists with institutional positions were known to exhibit guarded and conservative responses.

1.4.4 2008: Broadening DO Legislation to Protect the Public

For another decade, the DO and LTO provisions remained unchanged. However, further amendments took place in 2008, with the primary objective of public protection from individuals who commit serious violent or sexual offences (except murder) who continue to pose a threat to society (Valiquet, 2008). The new provisions further adjusted the requirements for DO applications and, thus applications became much more prevalent. Section 752.01 of the *Criminal Code* (1985) speaks to the Crown's duty to advise the Court as follows:

> If the prosecutor is of the opinion that an offence for which an offender is convicted is a serious personal injury offence that is a designated offence and that the offender was

convicted previously at least twice of a designated offence and was sentenced to at least two years of imprisonment for each of those convictions, the prosecutor shall advise the court, as soon as feasible after the finding of guilt and in any event before sentence is imposed, whether the prosecutor intends to make an application under subsection 752.1(1) (*Criminal Code*, 1985, p. 964).

Although the information gathering process and decision to apply for a preventative detention hearing can occur upon the charging of an individual, the commencement of the formal process does not occur until after the individual has been convicted of a "serious personal injury offence" (Public Safety Canada, 2009). A "serious personal injury offence" (*Criminal Code*, 1985, p. 963) is defined generally as an indictable offence (other than treason or murder) involving the use or attempted use of violence, or endangerment of the life and safety of, another person (including psychological damage), or an offence or attempt to commit a sexual offence under sections 271, 272, or 273 of the *Criminal Code* (1985).

The revisions also turned the onus onto the Defendant to prove on a balance of probability that he or she is not dangerous (section 757). However, the Supreme Court of Canada has since weighed in on this provision and have explictly stated "To obtain a designation of dangerousness resulting from violent behavioiur, the Crown must demonstrate beyond a reasonable doubt, *inter alia*, that the offender represents a threat to the life, safety or physical or mental well-being of other persons" (*R.* v. *Boutilier*, 2017, p. 938).

The 2008 amendments also limited judicial discretion around findings of dangerousness and sentencing as follows:

Application for finding that an offender is a dangerous offender

753(1) On application made under this Part after an assessment report is filed under subsection 752.1(2), the court shall find the offender to be a dangerous offender if it is satisfied

(a) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (a) of the definition of that expression in section 752 and the offender constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing

(i) a pattern of repetitive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a failure to restrain his or her behaviour and a likelihood of causing death or injury to other persons, or inflicting severe psychological damage on other persons, through failure in the future to restrain his or her behaviour,

(ii) a pattern of persistent aggressive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a substantial degree of indifference on the part of the offender respecting the reasonably foreseeable consequences to other persons of his or her behaviour, or

(iii) any behaviour by the offender, associated with the offence for which he or she has been convicted, that is of such a brutal nature as to compel the conclusion that the offender's behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint; or

(b) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (b) of the definition of that expression in section 752 and the offender, by his or her conduct in any sexual matter including that involved in the commission of the offence for which he or she has been convicted, has shown a failure to control his or her sexual impulses and a likelihood of causing injury, pain or other evil to other persons through failure in the future to control his or her sexual impulses. (*Criminal Code*, 1985, p. 965)

Under these new provisions, upon the criteria being met, the judicial decision maker must find the individual to be a DO. Past legislation allowed the judicial decision maker to use their discretion at this stage depending on their assessment of risk management and treatment amenability in the community (e.g., designate the individual as a LTO and impose a determinate sentence and LTSO). The SCC has explicitly stated "[t]he proposition that a court is under a duty to declare an offender dangerous every time the statutory criteria are satisified would introduce an unnecessary rigidity into the process and overwshoot the public protection purpose." (R. v. Johnson, 2003, p. 358). However, these new revisions could possibly lead to a significant

increase in DO designations as the judicial decision makers may now feel they have a limited alternative under the law.

Where the new provisions did provide judicial discretion was with respect to the sentence that could be levied. In the past, once an individual met the criteria for a DO they had to receive an indeterminate sentence. However, the 2008 amendment states as follows regarding the penalty stage for DOs:

> Sentence for dangerous offender
>
> (4) If the court finds an offender to be a dangerous offender, it shall
>
> (a) impose a sentence of detention in a penitentiary for an indeterminate period; or
>
> (b) impose a sentence for the offence for which the offender has been convicted – which must be a minimum punishment of imprisonment for a term of two years – and order that the offender be subject to long-term supervision for a period that does not exceed 10 years; or
>
> (c) impose a sentence for the offence for which the offender has been convicted (*Criminal Code,* 1985, p. 966).
>
> Sentence of indeterminate detention
>
> (4.1) The court shall impose a sentence of detention in a penitentiary for an indeterminate period unless it is satisfied by the evidence adduced during the hearing of the application that there is a reasonable expectation that a lesser measure under paragraph (4)(b) or (c) will adequately protect the public against the commission by the offender of murder or a serious personal injury offence (*Criminal Code*, 1985, p. 967).

However, if the individual is not found to be a DO (i.e., the criteria set out are not met), then the *Criminal Code* (1985) sets out the following:

> (5) If the court does not find an offender to be a dangerous offender,
>
> (a) the court may treat the application as an application to find the offender to be a long-term offender, section 753.1 applies to the application and the court may either find that the offender is a long-term offender or hold another hearing for that purpose; or
>
> (b) the court may impose sentence for the offence for which the offender has been convicted (*Criminal Code*, 1985, p. 967).

Individuals with no prior criminal history do not commonly face a preventative detention hearing or receive a special sentencing designation, but can be found to be a DO under Section 753(1)(a)(iii) (i.e., if the index offence was sexual and particularly brutal). Proving this particular criterion can be difficult as the term 'brutal' is subjective and not uniformly agreed upon amongst relevant parties. Typically, individuals have to show a persistent and aggressive pattern of behavior (sexual or non-sexual) to be eligible for a special sentence designation. Decisions by the Crown on which cases to proceed with a preventative detention application and what type of application to bring are said to occur on a case-by-case basis. However, if a DO application is pursued, the legislation requires the judicial decision maker to consider whether the individual meets the criteria for an LTO as well (*R.* v. *Johnson*, 2003, p. 358).

A DO sentenced to an indeterminate sentence is eligible for day parole after four years and for regular parole after seven years; they are also reviewed by the Parole Board of Canada every two years thereafter (John Howard Society of Alberta, 1999; Valiquet, 2008). If ever paroled (in the case of DOs with indeterminate sentences), DOs remain under supervision for the rest of their lives, but they will remain imprisoned if they continue to present an unacceptable risk to society (Valiquet, 2008). Should DOs under supervision violate the conditions of the Parole Board of Canada, they may be imprisoned indefinitely (Valiquet, 2008).

If the law fails to incapacitate an individual who gave indications of potential danger who then go on to harm more people, then the justice system fails its mandate to protect the public (Milward, 2014). On the other hand, there is the competing concern of subjecting someone to indefinite detention based on future crimes yet to be committed, but whose potential risk could be managed short of calling upon such an extreme measure (Milward, 2014).

1.4.5 National Flagging System for High-Risk Offenders

Individuals are identified as potentially eligible for preventative detention applications through several means, one of which is a database created in 1995 called the National Flagging System for High-Risk Offenders (Public Safety Canada, 2009). According to Public Safety Canada (2009), the core protocols establish that its goals and purpose are to assist the Crown to more effectively prosecute individuals who commit high-risk violent offences, as well as prevent individuals who commit high-risk violent offences from falling through jurisdictional gaps in the criminal justice system. Ultimately, the system was set in place to encourage the Crown to make LTO and DO applications in appropriate cases.

The primary concern when the flagging system was introduced was that individuals could evade the system by merely relocating to another province or territory to avoid attracting attention (Public Safety Canada, 2009). These individuals were committing serious crimes, but crimes not yet severe enough to warrant an LTO or DO application. Now there are coordinators in place to share information amongst relevant parties regarding individuals who are high-risk (Public Safety Canada, 2009). Once identified, the Crown will review the case to determine whether the *Criminal Code* (1985) criteria for a preventative detention application is relevant. In conducting a review, the Crown will gather a variety of criminal justice and related information to support their application (see Public Safety Canada, 2009 for more detailed information regarding the application process).

Research has confirmed the utility of the National Flagging System for High-Risk Offenders (Blais & Bonta, 2015; Yessine & Bonta, 2006); however, there are comments that the coordinators of the database would benefit from utilizing structured risk assessment when making flagging decisions (Blais & Bonta, 2015). Further, research notes that flagged individuals were much more likely to be subject to a DO or LTO designation on reconviction compared with individuals who committed violent offences who were not flagged, but were equally high in risk (Yessine & Bonta, 2006). Moreover, it was found that 14% of flagged offenders included in the Blais and Bonta (2015) study were provided a special sentencing designation compared to 1% of Canadian violent recidivists.

During their attempt to better understand the risk of recidivism of DOs, Alexander and Wong (2000) found that the earlier DO designation process seldom included systematic analyses of criminal behavior or scores on actuarial risk measures of risk of recidivism. Therefore, it is very likely that there are non-DOs who fit the DO criteria (as the criteria are too broad) but never underwent DO proceedings (Alexander & Wong, 2000). Recent research has shown that DOs score comparably to non-DOs on actuarial measures of risk (Witte et al., 2001) and are not fundamentally different from each other (Koopman, 1985; Nicholaichuk et al., 2013; Trevethan et al., 2002). This makes the National Flagging System and application for preventative detention hearings arbitrary. Moreover, it has been noted that the legislative criteria for preventative detention applications is “vague” (Public Safety Canada, 2017, p. 16).

An evaluation of the National Flagging System occurred by Public Safety Canada in 2017 and studied the system between 2012 and 2017 for relevance and performance, including

continued need, alignment with federal government priorities, alignment with federal roles and responsibilities, progress towards achievement of intended outcomes, and efficiency and economy (Public Safety Canada, 2017). It was found, amongst other things, that the system continues to be required, it is serving its purpose, it is being inconsistently used across jurisdictions, and revisions to the system are required. Examples of revisions include an aim to increase consistent use across jurisdictions and improve the timeliness and ease of access to information from other parties (e.g., RCMP, Correctional Service Canada) (Public Safety Canada, 2017). Coordinators within the evaluation stated that further research required included: 1) research on the prediction of risk, especially with respect to Indigenous offenders, in order to validate tools and criteria, 2) outcomes of DO applications and a comparison of DO rates across jurisdictions, and 3) an assessment of the effectiveness of s. 810 orders (Public Safety Canada, 2017). These topics for future research appear to show that the coordinators who use the system are interested to learn more about and focus the approach of the system; however, no further research was planned at the time (Public Safety Canada, 2017).

1.4.6 Criticisms of the Current Legislation

Preventative detention legislation makes several assumptions: a) that there is a subset of individuals who are high-risk and who are not able to inhibit their violent (including sexual) criminal behavior, b) that prolonged incarceration (or supervision) to ensure public safety is necessary, and c) that this subset of individuals can accurately (and consistently) be identified. The second assumption (i.e., prolonged incarceration is necessary to ensure public safety) has been criticized given that lengthy sentences are already in place for dealing with individuals who commit violent and/or sexual offences (Greenland, 1984; Koopman, 1985; Law Reform Commission of Canada, 1975; Webster et al., 1985; Zanatta, 1996). Shortly after the preventative detention legislation was enacted, Webster et al. (1985) conducted a review wherein it was estimated that half of the DOs at the time were eligible for a life sentence based on their offences and the rest of the sample would have qualified for a term of incarceration of at least 10 years. This criticism, of course, ignores the first assumption that there is a subgroup of individuals who are high-risk and whose public risk cannot be controlled by existing sentencing options. That is, if the legislation fails to identify individuals who are the highest risk for which the designation is meant, then the legislation's validity as a necessary sanction for the protection of the public comes into question.

The third assumption (i.e., accurate and consistent identification of individuals who are the highest risk) has been criticized in that the selective and arbitrary application of the legislation may violate individuals' rights under the *Canadian Charter of Rights and Freedoms* (e.g., *R.* v. *Lyons*, 1987). To date, the Courts have rejected constitutional challenges to preventative detention and upheld the discretionary power of prosecutors. In that regard, Bonta, Harris et al. (1996) interviewed 21 prosecutors experienced with DO applications in order to determine what factors are considered in bringing forth an application. Consensus amongst the respondents were limited with the most common factors listed as: an index offence that was sexual, an offence with a child victim, the presence of antisocial personality disorder, and the severity of the individual's criminal record. It appeared that these factors were considered to heighten an individual's risk to public safety, even those these criteria could apply to a large proportion of individuals. More research is required on the decision-making process given that there are no universal criteria in deciding to bring forth a preventative detention application.

1.6 Dangerous Offender Population

1.6.1 Breakdown of Dangerous Offender Population

The DO population is generally increasing year-on-year and remains of interest to researchers, lawyers, and criminologists alike. By the end of the fiscal year 2018-2019, there were 967 individuals designated as DOs since 1978, and 67.6% had at least one current conviction for a sexual offence (Public Safety Canada, 2020). According to Public Safety Canada (2020), there were 39 new DO designations in 2018-2019 which is the lowest amount since the 2010-2011 fiscal year. Of the 967 DOs, 826 remain under the responsibility of CSC, and of those, 655 (79.3%) had indeterminate sentences and 171 (20.7%) had determinate sentences with LTSOs.

Of the 826 DOs, 726 (87.9%) were in custody (representing 5.1% of the total in-custody population) and 100 (12.1%) were in the community under supervision. Of the 100 in the community under supervision, 25 (25%) were DOs with indeterminate sentences (including DSOs, HOs, and individuals also serving a life sentence) which represents 3.8% of the DOs with indeterminate sentences. By the end of the fiscal year 2018-2019, there were ten females with a DO designation. Individuals with Indigenous heritage accounted for 35.5% of DOs and 25.2% of the total federal correctional population (Public Safety Canada, 2020). In addition to the DOs, there remained within federal jurisdiction 14 DSOs and two HOs (Public Safety Canada, 2020).

1.6.2 Jurisdictional Breakdown of Dangerous Offenders

Jurisdictionally, as of the fiscal year end 2018-2019, the breakdown of DO designations by province/territory ranges from 0 (Prince Edward Island) to 411 (Ontario) since 1978 (Public Safety Canada, 2020). Twelve of the 13 provinces/territories have active DOs with indeterminate sentences and 10 of the 13 provinces/territories have active DOs with determinate sentences and LTSOs. Moreover, Saskatchewan has a disproportionately high rate of DOs (indeterminate and determinate) compared to its overall population. Table 1 sets out the number of active DOs per 100,000 population for provinces with a population of at least one million.

Table 1

Jurisdictional Breakdown of Active Dangerous Offenders

Province	Population Estimate (2021)	Number of Active DOs	Number per 100,000
QC	8.59 million	114	1.33
AB	4.44 million	55	1.24
MB	1.38 million	27	1.95
ON	14.79 million	352	2.38
BC	5.17 million	134	2.59
SK	1.18 million	94	7.97

Note: As at the fiscal year end 2018-2019 (*Public Safety Canada*, 2020). DO = Dangerous Offender.

The above-noted six provinces account for 776 of the 826 active DOs (or 94%) as of the end of the fiscal year 2018-2019. As can be seen from Table 1, Saskatchewan has 7.97 active DOs (indeterminate and determinate with an LTSO) per 100,000 population, which is over three times as many as any other province/territory, and represents approximately 11.4% of all active DOs in Canada. Along with the highest rate of DOs per 100,000 population, it is noted that Saskatchewan also has the highest percentage of Indigenous peoples at 16.3%, followed by Manitoba at 15.5%, Alberta at 6.5%, British Columbia at 5.9%, Ontario at 2.8%, and Quebec at 1.8%. Identification of the ethnic background of the active DOs according to each province and year was not available. Overall, this data speaks to the findings that the number of preventative detention applications have not only increased over time (MacAlister, 2005), but also that the provisions and treatment are being applied arbitrarily across jurisdictions, which appears to be

resulting in discrimination against specific groups of individuals (Bonta, Harris et al., 1996; Grant, 1985).

1.6.3 Dangerous Offender Research

Early research on the DO population was primarily focused on descriptive information (Berzins, 1983; Koopman, 1985; Mackay, 1983), however future studies commenced comparing DOs to other known high-risk individuals (e.g., Bonta et al., 1998; Zanatta, 1996). Several comparison groups have been studied including individuals who committed serious personal injury offences not designated as DOs (Zanatta, 1996), individuals with detention failures (i.e., individuals held in custody until warrant expiry and who subsequently reoffended violently; Bonta, et al., 1998), and demographically matched individuals who committed sexual offences (Zanatta, 2005). Overall, these three studies have demonstrated that, compared to non-DO, DOs are more likely to have index sexual offences (Bonta et al., 1998; Zanatta, 1996) and a history of convictions for sexual offences (Bonta et al., 1998; Zanatta, 1996, 2005). As well, DOs overall risk profile (as determined by valid and reliable risk assessment measures) was similar to the various comparison groups (Bonta et al., 1998; Zanatta, 1996). Moreover, of released individuals serving indeterminate sentences, almost three-quarters remained free of new convictions after four to seven years, evidencing a lower recidivism rate than individuals serving determinate sentences (Johnson & Grant, 2004). This leaves one wondering if these individuals are in fact a higher risk to recidivate than other individuals within the criminal justice system without special sentencing designations.

However, two areas that Zanatta (2005) reported DOs scored significantly higher in than the group of matched individuals who committed sexual offences were: a) psychopathy, and b) sexual offender risk measures. Compared to previous studies and in an effort to improve the comparability of both groups, this particular study had 164 participants and ensured that an equal number of each type of sexual offender (e.g., child molester, rapist, etc.) was present in both designated and non-designated individuals.

In an effort to assess the actual recidivism risk posed by a sample of DOs, Nicholaichuk et al. (2013) created a group of “pseudo-DOs” by matching a group of 100 non-designated individuals who committed sexual offences taken from an earlier study (Gu et al., 2004) to a group of 100 DOs on age (current age for DOs and age at release for pseudo-DOs) and actuarial risk (scores on the Brief Actuarial Risk Scale; Olver et al., 2013). Matching in this way is

required to assess recidivism risk given that so few DOs are ever released into the community. It was found that sexual recidivism rates after an average follow-up of 10 years for the pseudo-DOs matched the average rate of recidivism for non-designated individuals who committed sexual offences (i.e., approximately 10%). These results indicate that the risk posed by DOs is no different than the average individuals who commit sexual offences. Overall, the Nicholaichuk et al. (2013) results support the criticism that DOs are not necessarily a distinctive subset of individuals who are high-risk and whether there are existing sentencing options (e.g., a lengthy period of incarceration) that may be more appropriate compared to an indeterminate sentence.

Research suggests that decisions have been made to legislation without substantial clinical research to determine what distinguishes DOs from other individuals who are not declared DOs (Langevin & Curnoe, 2014). Langevin and Curnoe (2014) reported that only one empirical clinical study of Canadian DOs with a comparison group is known (Bonta et al., 1998). Bonta et al. (1998) stated that DOs appeared to be a random selection of individuals who commit violent sexual offences and noted that the clinical profile of DOs was not unique among individuals who commit sexual and violent offences, just more extreme in some of their features (Langevin & Curnoe, 2014).

1.7 Role of the Expert

For years, psychiatrists and psychologists have actively contributed to knowledge in the area of the judicial system (Roberts, 2004). Commonly, these experts have provided assessment and treatment services to assist the Courts with judicial decisions. Expert assessments influence sentencing or disposition decisions and DO determinations (Hemphill & Hart, 2004) and are most useful to the judicial decision makers if they address the relevant legal or psychological issues for which the referrals were made (Roesch et al., 1998). Expert testimony has always played a pivotal role in preventative detention hearings and some have argued that preventative detention hearings are "virtually dependent on psychiatric testimony" (Rogers & Lynett, 1991, p. 79). Experts can provide the judicial decision maker with information concerning the offences, the degree of harm committed against victim(s), the risks posed to the public, and the characteristics of the individual, all of which are considered during sentencing (Statistics Canada, 1998).

Even though judicial decision makers are not bound by the recommendations provided in expert assessments, they frequently implement recommendations considered reasonable and

feasible for referral questions (Hemphill & Hart, 2004; Jaffe et al., 1985). Jaffe et al. (1985) found that judicial decision makers accepted and implemented experts' intervention recommendations in more than 80% of cases. Therefore, it is useful for experts to be familiar with community resources available to address the social, emotional, and educational needs of individuals and their families (Hemphill & Hart, 2004).

Given that preventative detention legislation requires that a forensic clinical assessment be completed, it is important to evaluate the quality and content of the assessments being provided to the Court. This is particularly important considering the evidence speaks to the importance of clinical opinions in the decision-making process. For example, studies examining review board decisions for individuals who have mental health diagnoses have found that the clinical opinion of the expert was the most predictive of the final decision compared to other potential variables (Hilton & Simmons, 2001; McKee et al., 2007). When conducting studies with potential jurors, it has also been found that both student and community mock jurors are influenced by expert evidence (Krauss et al., 2012; Krauss & Sales, 2001; McCabe et al., 2010). That said, there does appear to be a preference among jurors for clinical judgment as opposed to actuarial risk estimates (Krauss et al., 2012; McCabe et al., 2010). Moreover, research on psychopathy has shown that a diagnosis of psychopathy (as presented by an expert) influenced mock jurors and judges to assign higher risk ratings (Boccaccini et al., 2008; Chauhan et al., 2007; Jones & Cauffman, 2008).

1.8 Risk Assessment

1.8.1 Utility and Purpose of Risk Assessment

Substantial advances have taken place in the development of risk assessment over the last 50 years. Today there is a recognition that risk assessment is a critical element of evidence-based practices and correctional intervention. Many of the prominent predictors of recidivism and combined factors into risk assessment tools are now consistent with and guided by the PCC framework and RNR model. There is general agreement that formal, statistical approaches to assessment are more accurate predictors of criminal behavior than unstructured clinical judgment (e.g., Grove et al., 2000). As the purpose of risk assessment has expanded beyond risk prediction to include risk management, contemporary assessment tools should incorporate both static and dynamic risk factors (Bonta & Andrews, 2017). Some researchers dispute the utility of risk assessments as they indicate that actuarial risk assessment instruments have large 95%

confidence intervals for risk estimates at a group level, but at an individual level, the confidence intervals were so wide that it renders risk estimates practically worthless (Hart et al., 2007). In essence, some researchers are saying that actuarial risk instruments cannot be used to estimate an individual's risk for future violence with any reasonable degree of certainty and should be used with great caution or not at all (Hart et al., 2007).

Some researchers also note that after controlling for time at risk, the rate of violence in individuals identified as high-risk by structured risk assessment instruments shows considerable variation (Singh et al., 2014). Without information on local base rates, assigning predetermined probabilities to future violence risk via a structured risk assessment is unsupported by the current evidence base (Singh et al., 2014). This significant finding emphasizes the requirement for caution when such risk estimates are utilized to affect decisions connected to public safety and individual liberty (Singh et al., 2014), such as preventative detention hearings. Research also notes that the results of individual risk assessments should explicitly report acknowledgement of all probable sources of error related to their use (Singh et al., 2014).

1.8.2 Generations of Risk Assessment

Risk assessments have a substantial history, and development in the area of risk assessment now have different approaches. Risk assessments initially used unstructured clinical judgment, which have been identified as first-generation assessments (Bonta, 1996). The unstructured clinical judgment includes few constraints on the decision-making process as evaluators are free to choose which information to review and how much to analyze, interpret, and report those data (Lyon et al., 2004). The second-generation of assessments represented a shift from professional judgment to more structured and standardized assessments wherein statistically relevant factors were selected for inclusion. Actuarial decision making improves predictive accuracy by demonstrating a marked improvement over chance probabilities and they tend to be more accurate than unstructured clinical judgment (Gardner et al., 1996; Harris et al., 1993; Menzies & Webster, 1995; Mossman, 1994). Development of a variety of static, actuarial measures generally demonstrates good predictive validity; for example, Campbell et al. (2009) demonstrated that the Statistical Information on Recidivism (SIR; Nuffield, 1982) (Bonta, Harman et al., 1996) and the Violence Risk Appraisal Guide (VRAG; Quinsey et al., 2006) both show strong predictive validity for future violent recidivism. However, despite static actuarial measures' strong predictive validity, they are quite limited in their utility as they cannot inform

changes in an individual's risk and they provide little information about an individual's problem areas and treatment needs (Wong & Gordon, 2006; Wong et al., 2009).

Third-generation risk assessments incorporate dynamic risk factors, which have the potential to change from treatment or other change agents, as do the risk appraisals incorporating such measures. Third generation approaches also extend to a number of structured professional judgment (SPJ) tools, which involve the establishment of clinical guidelines (Borum, 1996; Douglas et al.,1999; Hart, 1998). If properly used, third-generation risk assessments should lead assessors towards sensible, balanced, and practical conclusions (Lyon et al., 2004). However, the final decision or recommendation regarding the perceived risk of violence and appropriate case management remains with the evaluator (Lyon et al., 2004). SPJ ameliorates problems with consistency and predictive validity while at the same time allowing the evaluator some flexibility in adapting the assessment process appropriately to each specific case (Hart, 1998).

At this point, assessment research saw one of the most significant advances over the past 20 years when there was recognition of criminogenic needs as dynamic risk factors and that the incorporation of these factors into a single assessment instrument is crucial (Hanson, 2005; Loza & Dhaliwal, 2005). Dynamic risk factors, as noted above, contribute information about risk that is not captured by purely static, historical risk factors. Third generation instruments, dynamic risk factors, and file review plus interview methods had the advantage in predicting violent recidivism (Campbell et al., 2009). Salient examples of this approach include the Level of Service Inventory-Revised (LSI-R; Andews & Bonta, 1995) or the Historical Clinical Risk-20 version 2 (HCR-20; Webster et al., 1997).

Currently, fourth-generation assessments are gaining popularity as they integrate the assessment of risk, need, and responsivity with planned intervention and have broad applicability across age, race, and gender (Bonta & Andrews, 2017; Campbell et al., 2009). Fourth-generation assessments incorporate assessments of potential targets of change, assessments of strengths and specific responsivity concerns, as well as the structuring of service plans and delivery (Andrews & Dowden, 2007). Examples of fourth generation risk measures include the Level of Service/Case Management Inventory (LS/CMI; Andrews et al., 2004), the Violence Risk Scale (VRS; Wong, & Gordon, 2006), and the third edition of the Historical Clinical Risk-20 (HCR-20^{v3}; Douglas et al., 2013).

The evolution of risk assessment from clinical judgment to structured assessments has led to questions about the accuracy of assessments conducted with each approach. Several studies have been conducted comparing the two approaches and in virtually all of the studies, the actuarial method outperformed the clinical method (Dawes et al., 1989). Further, a meta-analysis of studies was conducted comparing the accuracy of clinical and mechanical (formal or statistical) methods for making judgments or decisions about health or human behavior (Grove et al., 2000). Grove et al. (2000) concluded that, on average, mechanical predictions are 10% more accurate than clinical predictions and that there was a distinct advantage for mechanical prediction in the areas of medicine and forensic settings (those that predict criminal behavior). However, three other meta-analytic studies (Campbell et al., 2009; Gendreau et al., 2002; Yang et al., 2010) have shown that risk assessments that include dynamic variables (e.g., Level of Service instruments) predict as well as violence-specific risk scales (i.e., those based on static factors) (Bonta & Andrews, 2017). These meta-analytic findings are not surprising as Gendreau, Little et al. (1996) conducted a meta-analysis showing that dynamic factors are as good as or better than static factors.

1.8.3 Predictors of Recidivism

Developing a useful risk/needs assessment tool requires identifying the factors associated with recidivism. Identifying predictors of recidivism or criminal behavior have been the focus of considerable research attention. Prior research on probationers has identified nine factors consistently associated with probation outcome. These include gender, age, marital status, education level, race, employment, prior criminal history, offence (being a property offender) and sentence length (Morgan, 1993; 1994; Sims & Jones, 1997). Other factors noted as robust predictors of recidivism include early family factors and criminal associates (Gendreau, Goggin et al., 1996; Gendreau, Little et al., 1996). However, the debate remains about the relative importance of other predictors such as the social class of origin, intelligence and personal distress.

Gendreau, Little et al. (1996) conducted a meta-analysis to identify the best predictors of adult offender recidivism. They identified 131 studies that produced 1,141 correlations with recidivism and sorted the predictors into 18 different domains, including ten static domains, seven dynamic domains, and one composite measure. Included were age, adult criminal history, pre-adult history of antisocial behavior, family criminality, family rearing practices, family

structure, gender, intellectual functioning, race, socioeconomic status, antisocial personality, companions, criminogenic needs (also considered criminal attitudes), interpersonal conflict, personal distress, social achievement, and substance abuse. They found that all of the predictor domains were found to have a statistically significant relationship to recidivism. However, specific predictors were stronger than others. Gendreau, Little et al. (1996) found that the strongest static predictors were adult criminal history and a history of antisocial behavior as a juvenile. The strongest dynamic predictors were companions, criminogenic needs, and antisocial personality.

Previously, the conventional approach was to focus mostly (or only) on static factors as predictors of recidivism. The Gendreau, Little et al. (1996) meta-analysis highlighted that dynamic risk factors are as significant as static factors as the dynamic domains had a stronger relationship to recidivism. The research also challenged common beliefs by highlighting the strength of the relationship between each predictor and outcome. For example, while substance abuse is a significant predictor, it does not have the most robust relationship to recidivism. Overall, the meta-analysis highlighted that dynamic factors are as important as predictors of recidivism as static factors, and that risk scales, which combine multiple factors, are better predictors than any single factor alone. In regards to the PCC, the Central Eight Risk/Need factors are supported by research.

1.8.4 Risk Assessment Measures

It now seems that professionals are utilizing over 400 instruments in violence risk assessment (Singh et al., 2014). Approximately half of those 400 are actuarial, and half are SPJ (Mills, 2017). Generally, risk assessment tools assist in the identification and management of individuals at risk of harmful behaviour, but no single risk assessment tool has been consistently shown to have superior ability to predict offending (Campbell et al., 2009; Gendreau et al., 2002; Walters, 2003). Yang et al. (2010) conducted a meta-analysis examining the predictive accuracy of violence risk assessment tools. The results on predictors of adults who engage in criminal behavior provide support for the generation of general risk/needs assessment tools that comprise both static and dynamic risk factors. The researchers concluded that all nine tools and their subscales predicted violence at about the same moderate level of predictive efficacy except Psychopathy Checklist-Revised (PCL-R; Hare, 1991) Factor 1, which predicted violence only at a chance level among men. The moderate level of predictive accuracy of these tools suggests that

they should not be used solely for some criminal justice decision making that requires a very high level of accuracy such as preventative detention. Yang et al. (2010) concluded that it follows that predicting who and under what conditions violence is more likely to occur, followed by effective management or intervention for those identified as high risk for violence, could be an effective violence prevention strategy.

In terms of the PCL-R specifically, a recent series of papers debated the utility of the instrument to predict serious institutional violence, particularly in the context of capital sentencing decisions in the United States (DeMatteo et al., 2020a; DeMatteo et al., 2020b; Hare et al., 2020; Olver et al., 2020). Some researchers expressed the belief that the PCL-R could not accurately predict an individual's risk for committing serious violence in high-security custodial settings and thus should not be utilized for same (particularly since the outcome could be a death sentence) (DeMatteo et al., 2020a; 2020b). However, other researchers expressed the opposite opinion; that is, that the PCL-R has both predictive validity and field reliability and remains a relevant tool for institutional risk assessment and management (Hare et al., 2020; Olver et al., 2020). Overall, it was believed that if the PCL-R was utilized ethnically and appropriately, then it remains a valid risk assessment instrument, even in the context of high-stakes contexts (e.g., capital sentencing, preventative detention) (Hare et al., 2020; Olver et al., 2020). The debate concludes that additional real-life research would be helpful in furthering any conclusions drawn.

In another meta-analysis, a comparison of some instruments was undertaken by Campbell et al. (2009), wherein 88 studies were examined and found that the effect sizes related to various instruments generally did not differ significantly. Further, in a systematic review, Singh et al. (2011) reported that many of the commonly used risk instruments demonstrated predictive accuracy in the moderate to high range (as operationalized per Rice & Harris, 2005). Another meta-analysis by Fazel et al. (2012) included 73 samples and found that measures explicitly designed to predict violence were more accurate in their predictions than instruments designed to predict general or sexual reoffending. Together, these meta-analyses indicate that the predictive accuracy for most instruments are generally in the moderate to high range and are similar across instruments and samples (Mills, 2017).

Furthermore, according to what the risk instruments were designed to predict, outcomes for recidivism in all of the risk assessment instruments were found (i.e., the VRAG; Sex Offender Risk Appraisal Guide (SORAG; Quinsey et al., 1998), Rapid Risk Assessment of

Sexual Offence Recidivism (RRASOR; Hanson, 1997), STATIC-99 (Hanson & Thornton, 1999), STATIC-2002 (Hanson & Thornton, 2003), and Minnesota Sex Offender Screening Tool-Revised (MnSOST-R; Epperson et al., 1998) (Hanson & Morton-Bourgon, 2009). Little variation was also found amongst the mean effect sizes of common actuarial or structured risk instruments (i.e., HCR-20, LSI-R, VRAG, SIR, PCL-R) (Campbell et al., 2009). Moreover, considerable research on the VRS has shown that changes in risk are associated with changes in outcome (Coupland & Olver, 2018; Lewis et al., 2013; Hogan & Olver, 2019).

However, challenges have arisen regarding the predictive validity of dynamic risk factors and the extent to which risk factors are salient across gender, race, and ethnicity (Caudy et al., 2013). Including dynamic needs in sentencing decisions basically increases the severity of the punishment because the individual has unmet social and psychological treatment needs that are suited for rehabilitative programming (Caudy et al., 2013). The added effort and loss of parsimony associated with including dynamic items that are not associated with recidivism (also known as non-criminogenic needs) is inefficient and may reduce the overall accuracy of the assessment (Caudy et al., 2013). Moreover, issues have been raised with respect to the use of actuarial risk assessments in Indigenous populations as they were not originally normed with that population; however, it has been found that most instruments have retained their validity and reliability even in the context of differing racial ancestry (see *Ewert* v. *Canada*, 2015, 2018 for additional details).

Elsewhere, Taxman (2006) says it may be essential to address these in order to make treatment of criminogenic needs effective. That being said, existing data suggest that most risk assessment tools have weak to moderate accuracy in most applications and that typically more than half of individuals judged by tools as high risk are incorrectly classified as they will not go on to offend (Douglas et al., 2017). False-positives may be especially prevalent in minority ethnic groups and, thus limitations of risk assessment tools should be well understood and factored into clinical and criminal justice responses (Douglas et al., 2017). Ultimately, measures derived from criminological-related theories or research produced larger effect sizes than did those of less content relevance (Campbell et al., 2009). Therefore, uncertainty remains concerning the most appropriate instruments for the prediction of violence given variations in item content, purpose and format, and administration method (Campbell et al., 2009). Moderate

ability to predict risk outcomes was consistent with estimates reported in other risk prediction meta-analyses (Campbell et al., 2009).

1.8.5 Indigenous Correctional Clients

According to Gutierrez et al. (2017), it is essential that risk assessments be structured, objective, reliable, and transparent. Further, they state that it is imperative that these risk assessments be empirically validated in order to defend their use with a diverse offender population. To date, meta-analyses and large-sample studies have demonstrated that the major risk factors and commonly used risk assessment scales predict recidivism for justice involved Indigenous individuals, but the predictive accuracy is somewhat lower for Indigenous compared to non-Indigenous individuals. Acknowledging the diversity of the Indigenous individuals and cultures within the overall population and the varied histories for each group (that is, First Nations, Métis, and Inuit), is critical when completing a risk assessment (Gutierrez et al., 2017). For example, in Canada, there are approximately 617 First Nations communities, representing 50 distinct nations and over 50 Indigenous languages (Indigenous and Northern Affairs Canada, 2015). One of the most consistent findings on Indigenous correctional clients is that, as a group, on most risk factors, they tend to score significantly higher than non-Indigenous individuals (Gutierrez et al., 2017).

Indigenous social history factors are consistently documented in security classification and discretionary release recommendations, and there is no evidence that they are being misperceived as risk factors (Keown et al., 2015). All of the Central Eight risk/need factors predicted general recidivism and seven of the eight predicted violent recidivism for Indigenous individuals (Keown et al., 2015). Further, it has been found that the best predictors of general recidivism for Indigenous individuals were three of the Big Four risk/need factors (that is, criminal history, pro-criminal associates, and antisocial personality pattern) (Keown et al., 2015).

Yessine and Bonta (2009) found that while criminal history, substance abuse, and antisocial personality pattern were predictive of general recidivism for Indigenous individuals, they demonstrated significantly lower predictive validity estimates than for non-Indigenous individuals. For the prediction of violent recidivism, there were no differences between Indigenous and non-Indigenous individuals on these variables. Critics assert that risk assessments often place the Indigenous individual in an unfavorable light, as they tend to score higher on most risk instruments than non-Indigenous individuals (Gutierrez et al., 2013).

As recent as 2018, questions have been raised regarding the appropriate use of actuarial risk assessment instruments in Canadian courtrooms. The case of *Ewert* v. *Canada* (2018) raises pertinent questions about the accuracy of the actuarial risk assessment instruments for Indigenous individuals within the broader Canadian criminal justice system, even though it was focused on the use of actuarial risk assessment instruments in the context of Parole Board of Canada hearings (Thompson, 2016). *Ewert* raises concerns of cross-cultural bias that may be implicitly built into actuarial risk assessment instruments, which then translate into inaccurate scores for Indigenous individuals (Thompson, 2016). However, a recent SCC decision in the matter has noted that further research is required when utilizing standard risk assessment measures on Indigenous individuals to ensure that the outcome is valid.

Directly related to the issue of assessing static factors is that of cross-cultural bias. Actuarial tests are susceptible to cultural differences and researchers have questioned their applicability to minority populations including Indigenous individuals in Canada as they were developed on non-Indigenous populations. However, it is important to note that it does not necessarily follow that because Indigenous individuals are higher risk than non-Indigenous offenders, risk factors (or scales) will predict recidivism differently for Indigenous individuals (Gutierrez et al., 2017). Moreover, a recent meta-analysis of 49 independent samples (n = 57,315 Indigenous and 204,977 non-Indigenous individuals) by Gutierrez et al. (2013) found that all Central Eight risk factors predicted general and violent recidivism significantly for Indigenous individuals. However, the predictive accuracy for all but two of the domains was lower for Indigenous individuals compared to non-Indigenous individuals.

In another meta-analysis, Wilson and Gutierrez (2014) examined different versions of the Level of Service Inventory risk scales in 15 samples (n = 21,807 Indigenous and 42,515 non-Indigenous individuals). The researchers found that the LSI total scores significantly predicted general recidivism for Indigenous individuals with moderate accuracy, and all subscales also predicted recidivism. Similar to Gutierrez et al. (2013), five of the eight subscales had lower predictive accuracy for Indigenous individuals compared to non-Indigenous individuals. Further, in a meta-analysis of the Level of Service (LS) measures examining 128 studies across 151 samples and 137,931 justice involved individuals, Olver et al. (2014) found the LS measures demonstrated generally identical effects in the prediction of general recidivism between Indigenous (r = .30. k = 13, n = 5,354) and non-Indigenous (r = .29, k = 24, n = 40.989) groups.

Regarding sex offenders, there is one meta-analysis (albeit small) available, examining the Static-99R and Static-2002R with Indigenous individuals (Babchishin et al., 2012). The Babchishin et al. (2012) study found that the Static-99R predicted sexual recidivism with similarly high levels of predictive accuracy for both Indigenous and non-Indigenous individuals. However, the Static-2002R predicted sexual recidivism for Indigenous individuals, but the effect size was small and was lower than the accuracy found for non-Indigenous individuals.

An additional study by Olver et al. (2018) examined the predictive properties of the Violence Risk Scale-Sexual Offender version (VRS-SO; Wong et al., 2003-2009) risk and change scores among Indigenous and non-Indigenous sexual offenders in a combined sample of 1,063 Canadian federally incarcerated men. The findings showed that Indigenous male offenders scored significantly higher on the Static-99R and VRS-SO, as well as had higher rates of sexual and violent recidivism; however, there were no significant differences found between Indigenous and non-Indigenous groups on treatment change. In addition, ancestral group differences in base rates of sexual recidivism was explained by individual differences on static and dynamic risk factors, although this was not the case for violent recidivism. The results also supported the predictive properties of VRS-SO risk and change scores with treated Canadian Indigenous sex offenders (Olver et al., 2018).

1.8.6 Dynamic Factors

Advances in risk assessment over the past 15 years have involved incorporating dynamic risk variables. Wong and Gordon (2006) defined dynamic variables as "changeable or potentially changeable factors (such as substance abuse, impulsivity, and criminal attitudes) that can be influenced or changed by psychological, social, or physiological means such as treatment interventions" (Wong & Gordon, 2006, p. 283). Thus, links to changes in the dynamic factors and changes in recidivism exist. Some example of prominent measures that use dynamic risk factors include, but are not limited to, the VRS, HCR-20, LSI-R, and LS/CMI. In contrast to purely static tools, the basis of measures incorporating dynamic variables is on the assumption that risk of violent reoffending can change and that dynamic variables can provide useful information about the treatment goals and needs of the individual. Research on dynamic variables has shown that they predict future recidivism equally as well as static variables but also allow for detection of changes in an individual's risk profile (Gendreau, Little et al., 1996; Olver et al., 2007).

Douglas and Skeem (2005) have argued that differentiation between risk status and risk state lacks in the understanding of risk. Most of the focus of previous research is on risk status—"interindividual risk level based largely on static factors" (Douglas & Skeem, 2005, p. 347). In other words, research has focused on the identification of individuals at high risk for violent behavior relative to other people and leaves little room for change over time. Although risk status is an important consideration, a high-risk status individual's actual level of risk "ebbs and flows over time within each" (Douglas & Skeem, 2005, p. 348). Thus, risk state is a measure of "intraindividual risk level determined largely by current status on dynamic risk factors" (Douglas & Skeem, 2005, p. 347). Risk state describes an individual's "propensity to become involved in violence at a given time, based on particular biological, psychological, and social variables in his or her life" (Douglas & Skeem, 2005, p. 349). Overall, the authors argued that it is better to examine the dynamic entity of risk through the empirical identification of dynamic factors and the broadening of our conceptualization of risk.

Brown and Rakow (2016) found that dynamic cues that can vary over time (e.g., level of violence) more strongly influenced clinicians' risk assessments than fixed static cues for a given individual (e.g., a diagnosis of psychopathy). Variation in factors affecting risk assessments for different settings was greater than the variability between clinicians for such judgments (Brown & Rakow, 2016). Research findings suggest an intriguing possibility that clinicians' violence risk assessments focus on incorrect data (Elbogen et al., 2002). For example, it is not uncommon for clinicians to focus on recent behaviours at the expense of past behaviours, even though recent behaviours and factors are not predictive of violence (e.g., Loeber et al., 2005) (Brown & Rakow, 2016). A fundamental error in risk assessment is to score seriousness of the current offence as a risk factor as it is not a major risk factor; however, it is an aggravating factor in sentencing (Bonta & Andrews, 2017). Just punishment and risk of reoffending are reflections of different concerns (Bonta & Andrews, 2017).

1.8.7 Protective Factors

Research on the clinical application of dynamic factors in risk assessment has been widely positive (see Ryba, 2008; Hanson, 2009); however, their use is not without limitations. One such limitation is that this field tends to focus on dynamic "risk" factors (Sheldrick, 1999) meanwhile neglecting possible dynamic "protective" factors (Tweed et al., 2011), which may have useful benefits and contribute to positive outcomes. Miller (2006) argued that the narrow

focus on risk factors in violence risk assessment may generate pessimism among clinicians and feeds an attitude toward the over-prediction of recidivism rather than other potentially positive outcomes. As such, Miller (2006), as well as other authors (e.g., Rogers, 2000; Laub & Lauritsen, 1994), argued that risk assessments using only risk factors could have a negative bias, generate unbalanced reports, and lead to lengthier periods of detention. The result would be costly to all parties involved.

There is a growing appreciation for the potential use of dynamic protective factors (such as a stable prosocial support network, religious beliefs, and healthy coping styles) in the assessment of risk to improve and balance risk assessments (Rogers, 2000; Hanson, 2009; de Ruiter & Nicholls, 2011). Unlike risk factors (which have links to an increase in an individual's likelihood of reoffending), protective factors are hypothesized to have a buffering effect on risk; however, it is as yet unclear whether protective factors have a mediating or moderating role in the relationship of violence risk to recidivism (Rogers, 2000). True to this hypothesis, protective factors have long been included as an under-addressed component of the RNR model of effective correctional treatment as seen in Andrews et al. (2004) and Wormith et al. (2012).

Protective factors perform equivalently to risk factors for prediction of a range of adverse outcomes (O'Shea & Dickens, 2015). Current risk assessment tools for sexual offending focus almost exclusively on assessing factors that raise the risk of offending, however, the inclusion of notions of desistance and strengths may provide additional guidance to the assessment and treatment of those who sexually offend (de Vries Robbé et al., 2015). Hanson's (2009) review of risk assessment for crime and violence notes that one of the most significant additions for the next generation of risk assessment tools is the incorporation of protective factors as well as risk factors. Although the adoption of protective factors into risk assessment has been slow, the identification of a variety of promising protective factors continues. The Structured Assessment of Protective Factors (SAPROF; de Vogel et al., 2007) for violence risk defines protective factors as "any characteristic of a person, his/her environment or situation which reduces the risk of future violent behavior" (p. 25).

A select few protective factors with the most significant empirical and conceptual support include: a) social support (Lodewijks et al., 2010; Hoge et al., 1996; Ullrich & Coid, 2011); b) emotional support (Lodewijks et al., 2010; Rennie & Dolan, 2010; Ullrich & Coid, 2011); c) leisure time (Hoge et al., 1996; Rae-Grant et al., 1989; Bouman et al., 2010; Ullrich & Coid,

2011); d) religious activity (Baier & Wright, 2001; Plutchik, 1995; Pearce et al., 2003; Rogers, 2000; Ullrich & Coid, 2011; Duwe & King, 2012); e) attitude toward intervention (Lodewijks et al., 2010; Rennie & Dolan, 2010); f) accommodation/housing upon release (Ullrich & Coid, 2011); and g) adaptive coping/prosocial problem solving (see Lodewijks et al., 2010; Rennie & Dolan, 2010).

1.8.8 Communicating Risk

Many individuals have voiced concerns regarding matters of risk communication. There appears to be a consensus that not only is clarity required in what we say, but we also need to understand how it will be perceived and employed by those who hear that message (Mills, 2017). For example, expert testimony of the diagnosis of psychopathy is becoming increasingly common in Canadian criminal Courts and may be used as support to justify more severe sanctions (Zinger & Forth, 1998). More concerns that expert testimony provided in a Court trial, especially testimony in regards to psychopathy, may promote unfounded prejudice or inflate weakly supported research findings to bias criminal justice decision makers (DeMatteo & Edens, 2006; Edens, 2001; Zinger, 1995; Zinger & Forth, 1998).

In many cases, substantial gaps exist between the testimony given by some mental health professionals and current empirical research (Zinger & Forth, 1998). Substandard testimony has the potential of unduly influencing judicial decision makers and resulting in unjustifiably harsher judicial dispositions, and such potential could result in abuses of human rights (Zinger & Forth, 1998). Further concerns surrounding dimensional versus discrete entities are noted (Zinger & Forth, 1998). Dimensional measures provide more precision and testimony should be in dimensional terms to avoid possible judicial misunderstandings (Zinger & Forth, 1998).

Experts are poised to assist the Courts by providing relevant information about legal issues, but expert witnesses should still provide testimony in an unbiased way that allows the judicial decision maker or jury to make the final decision (Campbell, 2000; Mercado & Ogloff, 2007; Shuman & Greenberg, 2003). Like all professionals in the field, expert witnesses have a professional responsibility to promote the well-being of their clients; arguably, confining testimony to an impartial description of the facts works best, focusing primarily on an individual's risk factors and needs (Ewing, 1983; Shuman & Greenberg, 2003). That being said, research shows that experts tend to show partisan allegiance in the way they scored individuals on the PCL-R and there is a disproportionate influence of partisianship on structured assessments

(Lloyd et al., 2010). Whether partisan allegiance is a matter of mistaken public perception (Mossman, 1994), group socialization processes (Saks, 1990), or purposeful fact-filtering for monetary gain, the reputation of the experts are contaminated by examples of substantial discrepancies between experts' diagnoses and interpretation of diagnostic criteria.

Many studies have found that there is a preference among experts to use categorical statements of risk (e.g., low, moderate, high; Heilbrun et al., 2004; Heilbrun, Philipson et al., 1999; Viljoen et al., 2010). Despite this preference, research has also consistently shown that experts are not fully aware of all the different ways that risk information can be presented and how that may influence how the information is received (Hilton et al., 2008; Scurich & John, 2011; Slovic et al., 2000). A study by Scurich and John (2011) showed that final decisions were affected by the manner in which the risk information was presented resulting in mock judicial decision makers rendering more lenient outcomes when a probability of violence not occurring (e.g., 80% chance) rather than a probability of violence occurring (20% chance). The impact of this risk communication style has also been found with potential jurors (Varela et al., 2013).

Moreover, beyond how risk is communicated, there is a paucity of research on the contents of risk assessment reports, particularly in preventative detention hearings. Viljoen et al. (2010) surveyed practicing forensic clinicians and they reported that their risk assessment reports were, on average, 12 to 13 pages and always or almost always contained descriptions of past violent offending, risk factors, rationales for risk judgments, and protective factors. The researchers noted that the forensic clinicians were less likely to report timelines for violent reoffending, the possible seriousness of future offending, the confidence in risk judgments, or mention relevant research in their reports. As well, the researchers found that the risk assessment reports concerning adult individuals who engage in criminal behavior were less likely to discuss protective factors, treatment considerations, and judgments regarding risk level, compared to juvenile offenders.

With regard to preventative detention hearings, it would be expected that the experts' risk assessments contained information regarding protective factors, treatment considerations, and judgments of risk level as these areas would be required for making treatment amenability and risk management decisions. Besides the actual contents of risk assessments, it is crucial to assess the potential biases and limitations associated with the experts completing the assessments. For example, it has not been unheard of to have experts provide a risk assessment and testimony that

is clearly biased. To that end, recent research has highlighted the importance of considering the adversarial nature of the proceedings and the party that requested the assessment.

1.8.9 Use of Risk Information

What does the Court do with the risk-assessment information? (Bloomenfeld, 2007). There is extensive variation in the language of risk assessment, including its references to risk, recidivism, and criminogenic need (Bloomenfeld, 2007), which are at times potentially misinterpreted by criminal justice professionals. There seems to be a general failure to recognize the urgency of the need to thoroughly evaluate risk-assessment instruments and their proper role in the sentencing process (Bloomenfeld, 2007). Zinger and Forth (1998) reported that harsher dispositions usually follow when an expert testifies to an individual having traits associated with psychopathy. A review of judgment discourse found that judicial decision makers "tend to dedicate a large portion of their deliberations to the evaluation of expert testimony" (Zinger & Forth, 1998, p. 21). Others have suggested that expert testimony around an individual's actuarial risk assessment appears to form part of the decision-making process for the judicial decision maker (Zinger & Forth, 1998). A study that focused specifically on the PCL-R, psychopathy, and its implications in the courtroom found that "psychopaths will receive longer sentences compared to their non-psychopathic counterparts" (Davey, 2013, p. 41).

Although the *Supreme Court of Canada* (SCC) cautioned judicial decision makers from handing over their decision-making power to the control of experts (*R.* v. *Lyons*, 1987), there is evidence to suggest that expert testimony is very influential in the designation of risk and declaration of dangerousness. Expert testimony also factors into an individual's potential for rehabilitation, which is a critical aspect of sentencing once provided a special sentencing designation. One basis for an indeterminate sentence is the evaluation of little to no prospect of rehabilitation or management in the community. Therefore, the importance of appropriately conducted risk assessments in preventative detention hearings is critical. If the assessment identifies an individual as high-risk, then the sentence imposed may be disproportionate to the gravity of the offence (Bonta, 2007). Judicial decision makers are not required to follow the recommendations of a pre-sentence report that may or may not be grounded on a risk/need assessment (Bonta, 2007). The risk level is but one factor, and sometimes the circumstances and nature of the offence can outweigh any risk/need assessment findings (Bonta, 2007).

Judicial decision makers have joined academic commentators in expressing concerns that over-reliance on risk assessment may trump proportionality (Cole, 2007). Research disclosed that the objections of many of those judicial decision makers were based on concerns about instrument validity and reliability, rather than on opposition to risk-assessment instruments entirely (Cole, 2007). Generally, they would like to be factoring in risk-assessment information into their sentencing decision-making processes (Cole, 2007). However, there is the considerable use of judicial reflection on the admissibility and adequacy of risk-assessment instruments in Canadian Courts (Cole, 2007). Judicial decision makers have found, in several cases, that the assessment tool may be an appropriate diagnostic instrument if it was used as a file organizer in concert with other verified file information and completed by someone properly trained. However, there is an ongoing problem that various instruments are being completed by insufficiently trained persons and without complete and accurate background documentation that can locate results in a broader context (Cole, 2007; Storey et al., 2013).

Several Canadian commentators have drawn attention to the possibility that a judicial decision maker may provide a sentence "[dis]proportionate to the gravity of the offence and the degree of responsibility of the offender" (Cole, 2007, p. 506), based on the risk assessment. Such commentators usually express concerns that the judicial decision maker: a) may impose a type of penalty harsher than that merited by the offence, b) may impose a longer punishment than that merited by the offence or the individual, or c) may impose conditions in the context of a community sentence more onerous than those merited by the individual and the offence (Cole, 2007).

Judicial decision makers will learn to view the outcomes of risk assessments simply as one more piece of evidence to be considered in the sentencing "mix." For example, despite what the risk assessment says if the judicial decision maker is behaving according to the sentencing rules, a potentially very dangerous individual who commits a relatively minor offence must have the benefit of a sentence which is proportionate to that particular offence. Thus, an individual who has repeatedly committed sexual offences who commits a minor theft is to be sentenced as a thief, not as a sex offender (Cole, 2007). That is, sentencing should reflect what the person has done rather than for who he/she is (Cole, 2007). The judicial decision maker should substantially discount, if not ignore, previous offences, particularly if there has been a substantial "gap" in the record (Cole, 2007). The ultimate danger with risk assessment is that, consciously or otherwise,

judicial decision makers may overemphasize considerations of risk at the expense of proportionality (Cole, 2007). Judicial decision makers are capable of weighing the evidence for its reliability, ignoring evidence that they have obliged to rule inadmissible, and, in a more general sense, are already in the business of attempting to determine the potential risk posed by an individual (Quigley, 2007), as per section 718(b) and (c) of the *Criminal Code* (1985).

While there is a concern that experts may misapply research findings, a more disquieting possibility is that some testifying professionals are ignorant of key aspects of risk assessment (Archer et al., 2006; Grann & Pallvik, 2002; Tolman & Mullendore, 2003) or misuse risk instruments (Cunningham & Reidy, 2002; Tolman & Rotzien, 2007). However, despite the problematic issue of some professionals' and lay persons' disregard for accurate actuarial risk assessment (Berlin et al., 2003; Freedman, 2001), valid concerns can be raised about expert testimony that uses risk instruments legitimately. Risk instruments have the potential to suggest a person exists in an enduring state of dangerousness rather than providing a probability range of future acts (Cunningham, 2006; McGuire, 2004; Mercado & Ogloff, 2007).

Maurutto and Hannah-Moffat (2007) express a great deal of concern about the way in which risk assessments are being used across the country (particularly in Manitoba and Saskatchewan). There is a contention that violence risk assessments are less accurate at predicting future violence than at predicting other types of criminality, leading to a danger that an individual may be punished on the basis of a misguided perception that there is a risk of future violence, rather than for what he/she actually did (Quigley, 2007). The individual who commits a less serious offence but who has known risk factors will undoubtedly score high and may attract a longer or more onerous sentence than is appropriate (Quigley, 2007). Cole (2007) laments the lack of reported cases in which judicial decision makers critically assess the use of these instruments.

1.9 Risk Assessment and Dangerous Offender Hearings

Historically, the federal government has demonstrated a long-standing interest in individuals who commit repeated violent offences (Lyon et al., 2004). Once the Crown starts an application, there must be an assessment performed by an "expert" to evaluate if the individual poses a threat to the community (Lyon et al., 2004). How the expert is chosen has been the contention of many legal challenges and it has generally been found that the Court must designate the expert to perform the assessment under s. 752.1 and the Crown's choice is not

entitled to deference (*R.* v. *A.H.*, 2017). Moreover, it has been noted that there is nothing in the legislation that supports a presumption in favour of the Crown's proposed expert and where the defence and Crown do not agree on who should be designated, they should have an equal role in assisting the Court in designating the assessor (*R.* v. *A.H.*, 2017).

Expert predictions often play a pivotal role in removing (or securing) an individual's liberty and protecting (or exposing) the public to possible violence (Lyon et al., 2004). Although research speaks to the importance of expert opinions and assessments in final decisions within the criminal justice system, the format and content of risk assessments can dramatically differ as there are no definitive guidelines for risk assessments specifically with respect to DO hearings. The literature for risk assessments supports four separately, but equally important, areas: a) an estimation of an individual's risk level, b) identification of the risk factors that contribute to that risk level, c) identification of potential risk management strategies to mitigate the individual's risk in the community, and d) appropriate communication of this information to the judicial decision maker (Conroy & Murrie, 2007; Heilbrun, Ogloff et al., 1999; Jackson & Guyton, 2008; Mills et al., 2010).

In DO cases, judicial decision makers are also required to consider the possibility of eventual release into the community and thus experts are required to provide an assessment of the individual's treatment amenability (i.e., potential for change). Further, although the legislation does not explicitly state the need for mental abnormality to be present, the majority of preventative detention hearings include a section on psychopathy. Given that a large proportion of DOs are individuals with sexual offences (e.g., Bonta et al., 1998) an assessment of sexual deviance would also be warranted as applicable.

Over time, the enormous social ramifications bearing on expert assessments attracted queries regarding their accuracy (Lyon et al., 2004). According to Hart (1998), violence risk assessment involves a process of evaluation that characterizes the probability that an individual will commit an act of violence, and also to develop strategies and interventions that will likely reduce or manage the likelihood of violence occurring. Judicial decision makers and experts rely heavily on risk assessment instruments that focus on static factors and instruments that can be subjective in their application (Milward, 2014). In particular, experts in preventative detention hearings have often come up with different results in their application of the PCL-R (Milward, 2014).

Experts often divide sharply over, and end in a deadlock between experts, about whether the risk can be managed safely under an LTSO instead of an indeterminate sentence (Milward, 2014). Such cases are often resolved through specific factors that tip the analysis in favor of granting an indeterminate sentence, including the individual's history of not complying with prior Court orders or supervisory programs, lack of demonstrable remorse or acceptance of responsibility, and credibility problems with the expert witness whom favors an LTSO (Milward, 2014). In other cases, establishing a clear basis on which to prefer the evidence of the expert calling for an indeterminate sentence over the evidence of the expert calling for a lesser sentence is not achieved (Milward, 2014). Such cases have frequently seen judicial decision makers exercise caution with a preference for assuring public safety, perhaps to the point of raising questions about whether the burden of proof is partially on the defence instead of the Crown (Milward, 2014), even though the SCC has expressed otherwise (*R.* v. *Boutilier*, 2017).

Blais (2015) examined judicial sentencing decisions in preventative detention hearings, as well as the expert risk assessment reports that were utilized to determine the level of reliance placed on expert risk assessment reports and to examine the presence of partisan allegiance. Blais (2015) found that judicial decision makers comments were consistent with expert assessments regarding risk, treatment amenability, and risk management. Further, she found that experts' ratings of treatment amenability and risk management were also significant predictors of the designation outcome, indicating that judicial decision makers rely on this information in making their final decision. Another finding showed evidence of partisan allegiance, with prosecution-retained PCL-R scores being significantly higher than defence-retained experts' scores. Blais (2015) stated the implications for the development of consistent guidelines for the communication of risk, treatment amenability, and management information were at a critical point.

Regarding the content of risk assessment reports, several sources have advocated for the inclusion of an actuarial assessment (i.e., statistical only) of recidivism risk, a list of relevant risk factors (both static and dynamic), and a discussion of treatment amenability and risk management (Blais, 2015). Furthermore, regarding developing reliable ways to communicate risk information (e.g., reliance on categorical risk levels), research has demonstrated that the perceived numerical risk estimates associated with categorical risk levels significantly differ across professionals (Blais, 2015). Despite limitations with current risk communication practice,

there is growing evidence that this information influences various decisions within the criminal justice system (Blais, 2015).

Changes have done little to address concerns as the majority of assessments are still completed by psychiatrists, and 50% still contain reports from competing sides (Blais, 2015). Preventative detention represents a significant shift within the criminal justice system from punishing the individual for a crime that has already been committed to punishing the individual based on the presumed high likelihood that a crime will occur in the future. Moreover, it has been found that judicial decision makers appear to be stating the information and evidence that supports their ultimate decision, which results in an almost perfect prediction of the outcome (Blais, 2015). In other words, the judicial decision makers appear to be making a decision and then utilizing the portions of evidence that support their decision (i.e., confirmation bias). The possibility that judicial decision makers are merely choosing the expert information that already confirms their pre-existing beliefs about the case is something that should be considered (Blais, 2015).

Lloyd et al. (2010) conducted research using judicial decision makers' written decisions from preventative detention hearings to examine whether judicial decision makers have been given a well-informed understanding of risk and whether the hearing outcomes are related to expert testimony regarding mental health diagnoses and risk estimates. Their main findings were that there was a trend for PCL-R scores to be related to hearing outcomes and that experts tended to show a partisan allegiance in the way they scored individuals on the PCL-R. Moreover, Lloyd et al. (2010) examined whether individuals with Indigenous heritage facing preventative detention hearings are more likely to be sentenced to indeterminate terms as compared to non-Indigenous individuals and whether there are mean differences in PCL-R scores between Indigenous and non-Indigenous individuals. They concluded that there were no differences between Indigenous and non-Indigenous individuals in their sample on any of the researched variables (Lloyd et al., 2010). However, they also noted that more than 65% of the sample did not identify the ethnicity of the individual in the written or oral decision.

Blais and Forth (2014) reviewed expert reports from preventative detention hearings between 2006 and 2008 from Ontario, British Columbia, and Alberta. Their primary conclusions were that risk assessment scores across all of the cases did not differ between prosecution-retained and Court-appointed experts for any of the risk assessment scales. Second, similarities

outweighed the differences in the experts' reporting practices, wherein Court-appointed experts were more likely to provide further information beyond communicating the results of the risk assessment scales. Third, Court-appointed experts were more likely to list the actual risk factors present in the case and more likely to discuss the possibility of risk management in the future, both of which are essential considerations in preventative detention hearings. The study did not investigate Defence-retained experts.

Further, Blais and Forth (2014) found that the scales that were chosen by the experts were consistent with the scales that are usually used in forensic risk assessment (Lally, 2003; Viljoen et al., 2010). The most commonly used scales were the PCL-R, VRAG, and the STATIC-99. Moreover, both prosecution-retained and Court-appointed experts were equally likely to utilize either actuarial scales or SPJ scales. As well, there was a significant difference in terms of the number of scales chosen by the experts, wherein the prosecution-retained experts were more likely to utilize more scales compared with Court-appointed experts (the use of multiple risk assessment scales has been advocated by experts, especially within the context of preventative detention hearings) (Jackson & Hess, 2007).

Regarding communicating the risk assessment results, as previous studies have demonstrated (e.g., Heilbrun et al., 1999; Viljoen et al., 2010), both types of experts utilized categorical risk judgments (e.g., low, moderate, or high) when communicating the results of actuarial scales, SPJ scales, and the final risk judgment. If an actuarial scale was used, both experts were equally likely to provide the absolute recidivism rates associated with the scale score. Court-appointed experts provided more detailed information on the individual's correctional history and were more likely to discuss risk factors and risk management (Blais & Forth, 2014).

Based on Blais and Forth's (2014) sample of reports, assessments provided by Court-appointed experts could be seen as being more appropriate for preventative detention hearings then prosecution-retained experts, given the higher likelihood that the information contained in those reports was provided as part of the sentencing decisions. Half of the reports also failed to discuss an individual's ability to change – dynamic risk factors were only discussed in cases in which assessors chose to use a SPJ scale; none of the actuarial scales contained dynamic items (Blais & Forth, 2014). Moreover, less than one-quarter of assessments mentioned protective factors, and there was an overall failure to include literature or descriptions of the risk

instruments being utilized (particularly concerning psychopathy) (Blais & Forth, 2014). It was also found that total scores for the VRAG, STATIC-99, and the SORAG were not predictive of the final designation (i.e., DO or LTO) (Blais & Forth, 2014). Information from risk scales is often emphasized in assessment reports; however, it is still unclear how this information impacts judicial decision makers. Further research into the specific effect of risk assessment scores on ultimate decisions is needed. To date, findings indicate that judicial decision makers put more weight on the PCL-R score of Court-appointed experts compared with prosecution-retained experts when making their final decision (Blais & Forth, 2014).

Cook et al. (2020) examined 214 preventative detention hearings for factors related to expert evidence on violence risk assessment. They found that judicial decision makers tended to make generally positive comments about expert witnesses and covered basic qualifications of the experts. Cook et al. (2020) also found that judicial decision makers tended to focus on the overall quality of the expert assessments, as well how they wished the data was communicated within the assessment. Moreover, they found that there was a paucity of discussion by judicial decision makers on Indigenous social history given the high proportion of Indigenous individuals facing preventative detention applications. Finally, the researchers found that judges provided both positive and negative comments on the risk assessments, as well as providing agreement or disagreement with the experts' positions. Overall, Cook et al., (2020) found there was considerable variation in how judicial decision makers interpreted and comment on the experts and their risk assessments.

Another research study by Almond et al. (2021) investigated how judicial decision makers are considering Indigenous individuals within the context of preventative detention hearings. In part, their findings highlighted the how little emphasis judicial decision makers are placing on specific factors influencing Indigenous individuals, wherein approximately 64% of cases involving Indigenous culture were meaningfully discussed. Moreover, Almond et al. (2021) found that Indigenous culture was found to be related to risk outcomes wherein Indigenous individuals were significantly more likely to be considered higher risk for reoffending by experts. However, these higher risk ratings did not correspond to more severe sanctions, indicating in the researchers' view that judicial decision makers are considering Indigenous factors in their sentencing decisions.

1.10 Summary

In summary, the PCC framework and RNR model attempt to explain why individuals commit crime and identify the risk factors involved with recidivism. The PCC framework and RNR model have become core components to risk assessment, particularly within the justice system. Specifically, preventative detention hearings require the use of expert testimony regarding risk assessment, treatment amenability, and risk management in the community. However, little is no known about the use of expert testimony, risk assessment, and judicial decision making, even though the outcomes can be extreme (i.e., indefinite incarceration). This study seeks to investigate and clarify the role of experts, risk assessment communication, and their influence on judicial decision making in preventative detention hearings.

Furthermore, research has demonstrated the sentencing of individuals involved in the criminal justice system in Canada is varied, jurisdictionally different and, at times, potentially disproportionate. As a part of preventative detention hearings, expert testimony regarding risk assessment is required by law. It is now widely recognized that risk assessment instruments are essential tools for predicting recidivism and identifying targets for treatment and intervention. Research evidence demonstrates the effectiveness of existing tools for predicting a variety of outcomes across different correctional populations. However, there remains several issues with risk assessment within the judicial system, including but not limited to, the selection of risk measures, inclusion of dynamic and protective factors, use of risk information, and communication of risk. Given the potential severity of the sentence length in preventative detention hearings, it is important for these and other issues to be considered and explored through research.

Although the label “dangerous offender” would suggest a high propensity for violence, the possibility exists that the DOs being targeted by the *Criminal Code* (1985) provisions may not be as a high-risk for future violence as once thought. Research findings raise the possibility that DOs may not be significantly more dangerous than some other individuals in the criminal justice system (Bonta et al., 1998; Koopman, 1985; Langevin & Curnoe, 2014 Nicholaichuk, 2013 Trevethan et al., 2002). Although the Crown is applying the DO provisions of the *Criminal Code* (1985) to a group of potentially high-risk, violent individuals, the question remains whether the Part XXIV provisions are vital for dealing with individuals who are high-risk and commit violent offences. It has been said that DO provisions could be eliminated as there already

exist provisions in the *Criminal Code* (1985) that allow for lengthy imprisonment of convicted high-risk violent individuals. It has been found that at least half of DOs were eligible for life imprisonment, and the remainder would have received a minimum of 10 years based on their index offence(s) (Webster et al., 1985).

CHAPTER 2: THE CURRENT STUDY

2.1 Rationale

This study investigated DO sentencing decisions to determine the role of risk assessments and the judicial system's use of them. Risk assessments serve an important function in the criminal justice system in that they assist judicial decision makers in making decisions about sentencing, supervision, and treatment. Although the risk assessment process has undergone a considerable amount of modification over the past 50 years, completion of research on their influence on preventative detention hearings is limited. Therefore, this study provided a look at the components of risk assessments, as interpreted by judicial decision makers, in the context of preventative detention applications. It assessed how risk assessments are being utilized in judicial sentencing decisions, as well as identified the most significant predictors tied to the judicial sentencing decisions, and the influence of expert opinion (if any). Specifically, there is an interest in the specific designation (i.e., DO versus LTO), the penalty ordered (i.e., indeterminate versus determinate with an LTSO), and how judicial decision makers are interpeting judgments of risk, treatment amenability, and risk management in the community, as well as other factors (i.e., dynamic, static, and protective factors) in the judicial decision making process.

This study is significant as there is a continual rise in the number of individuals involved in preventative detention hearings and being designated as DOs and, in most cases, serving indeterminate sentences. It is unknown how many of the decisions are focusing on static factors rather than considering dynamic and protective factors when levying their decisions. However, there has been a surge in research and evidence to support the use of dynamic and protective factors in the assessment of risk to recidivate, treatment amenability, and risk management in the community (as seen in the PCC framework and RNR model). Therefore, it is crucial to evaluate whether or not experts and judicial decision makers are considering various factors when coming to a final decision. This study contributes to the growing literature regarding DOs in Canada and how risk assessments within preventative detention hearings are not only conducted, but communicated and interpreted by both the experts and judicial decision makers.

2.2 Research Questions and Hypotheses

In light of the paucity of research in the areas of risk assessment and the judicial system, much of this research was exploratory; however, the following questions and hypotheses were developed:

2.2.1 Expert Rating and Outcome (Hypothesis 1)

It was hypothesized that the judicial decision makers' interpretation of experts' ratings of risk will correspond with designation outcome (i.e., DO versus LTO) and penalty outcome (i.e., indeterminate versus determinate with an LTSO). Specifically, more severe sanctions (i.e., DO versus LTO and indeterminate versus determinate with an LTSO) will result if judicial decision makers interpreted higher risk judgment ratings, lower treatment amenability ratings, and less favorable chances of managing risk in the community ratings. Previous research partially supports this hypothesis (Blais, 2015).

2.2.2 Presence of Partisanship (Hypothesis 2)

The 1997 legislation change continued to address partisanship when it required only one risk assessment (ordered by the Court for the Court). However, previous research continues to support multiple risk assessments being presented in preventative detention hearings (Blais, 2015). Therefore, it is of interest to know if, in the cases of multiple risk assessments being presented (specifically a Court-appointed expert and Defence expert), partisanship exists, particularly in light of the fact that Court-appointed experts are meant to be neutral parties. Previous research seems to suggest that experts can generally agree that an individual is high risk overall, but vary in their agreement on treatment amenability and risk management in the community (likely as they are more subjective ratings) (Blais, 2015). Thus, it is hypothesized that in hearings that contain multiple risk assessments, the judicial decision makers' interpretation of the overall risk rating between experts will not differ significantly; however, the judicial decision makers' interpretation of the experts' ratings of treatment amenability and risk management in the community will significantly differ between experts, with Defence experts being more encouraging than Court-appointed experts.

2.2.3 Presence of Static, Dynamic, and Protective Factors (Hypothesis 3)

Research supports dynamic and protective factors as being influential in assessing an individual's risk level, as well as treatment amenability and risk management in the community (e.g., Bonta & Andrews, 2017). However, research has also found that less than half of all

assessments in preventative detention hearings contained information on dynamic or protective factors (Blais & Forth, 2014). Are either experts and/or judicial decision makers addressing dynamic and protective factors and, if so, is it leading to lower ratings of risk and thus less severe sanctions? It is hypothesized that, if addressed, judicial decision makers' interpretation of dynamic and protective factors will not be related to less severe sanctions as the dynamic and protective factors will be deemed insufficient to change the static factors that are focused on during risk assessments.

2.2.4 Effect of 2008 Legislation Change (Hypothesis 4)

The 2008 legislation change provided the judicial decision maker with less discretion in assigning the designation (i.e., DO or LTO); however, it provided the judicial decision maker with more discretion as to what penalty to levy (i.e., indeterminate, determinate with an LTSO, or determinate only). It is hypothesized that the majority of DOs will continue to receive indeterminate sentences rather than determinate sentences with an LTSO. It is also hypothesized that the less severe sanctions (i.e., determinate with an LTSO), have become more common in the last several years than in the first several years since the 2008 legislation change due, in part, to the law being referenced having to coincide with the year of the index offence. For example, due to the length of time that it takes to apply for and complete a preventative detention hearing, many hearings were conducted after the legislation change but reference the law that was in effect at the time of the index offence. Further, have DO indeterminate designations decreased (as a ratio to the overall special sentencing designations) with the variations in legislation? It is hypothesized that DO indeterminate designations have not decreased as a ratio to the overall special sentencing designations since the 2008 legislation change.

2.2.5 Ethnicity (Hypothesis 5)

Given that 35.5% of Dos have Indigenous heritage (Public Safety Canada, 2020), analyses will be completed on each variable to determine if Indigenous heritage is associated with DO sentencing decisions. No specific hypotheses will be put forth as previous research has shown that there were no differences when racial ancestry of DOs was examined (Lloyd et al., 2010), although any such associations are reported.

2.3 Method

2.3.1 Ethics

The present research was archival and utilized publicly accessible information and active participation of the individuals involved in the preventative detention hearings was not required. As such, an ethical exemption for this study was obtained from the University of Saskatchewan's Behavioural Research Ethics Board (BEH ID 912).

2.3.2 Sample

The sample consisted of 140 federally incarcerated adult males who had undergone a preventative detention hearing to designate them a DO under Section 753 of the *Criminal Code* (1985) between July 2, 2008 and July 2, 2018 in four Canadian provinces (i.e., British Columbia, Alberta, Saskatchewan, and Manitoba). Table 2 presents the important sample characteristics. The mean age of the sample at the index offence was 37.1 years (*SD* = 9.2) and the mean age at the preventative detention hearing was 41.1 (*SD* = 9.1). Over half of the men (*n* = 82, 58.6%) were of Indigenous descent and 41.4% (*n* = 58) were non-Indigenous. Approximately 41% (*n* = 58) had at least a grade 10 level of education and 32.9% (*n* = 46) had a grade 9 education or less. The vast majority of the individuals had documented substance use issues (*n* = 121, 87.1%), adverse childhood experiences (*n* = 116, 82.9%), mental health diagnoses (i.e., primary substance use disorder) (*n* = 118, 84.3%), and personality diagnoses (i.e., primarily antisocial personality disorder) (*n* = 118, 84.3%). Only 17.1% (*n* = 24) had noted cognitive diagnoses and 17.5% (*n* = 24) had gang involvement (whether in prison or in the community).

In terms of criminal history, 68.6% (*n* = 96) had a noted youth record and the mean age of first offence was 16.3 years (*SD* = 4.7). The mean number of prior convictions was 37.4 (SD = 27.4) which may be an underestimate due to reporting methods. Approximately half (*n* = 78, 55.7%) of the individuals had a prior sexual conviction and the mean number of prior sexual offences was 1.8 (*SD* = 2.9). Approximately 93.6% (*n* = 131) of the individuals had at least one prior failure on community supervision. It was not uncommon for the index offences to include both sexual (*n* = 72, 51.4%) and violent (*n* = 91, 65.0%) offences. Most of the decisions coded involved index offences that occurred post-legislation change (*n* = 91, 65.0%).

Table 2

Defendant Characteristics

Measure	*n*	Mean (*SD*)	Frequency (%)
Demographics			
Age at hearing		41.1 (9.1)	-
Indigenous descent	82	-	58.6
Grade 9 education or less	46	-	32.9
Grade 10 education or higher	58	-	41.4
Gang affiliation	24	-	17.5
Substance use issues	121	-	87.1
Adverse childhood experiences	116	-	87.2
Mental health diagnoses	118	-	84.3
Cognitive diagnoses	24	-	17.1
Personality disorder diagnoses	118	-	84.3
Criminal History			
Youth record	96	-	68.6
Age at first offence (years)		16.3 (4.7)	-
Prior convictions		37.4 (27.4)	-
Prior sexual conviction	78	-	55.7
Prior sexual offences		1.8 (2.9)	-
Prior failure on community supervision	131	-	94.9
Index Offence			
Age at index		37.1 (9.2)	-
Index sexual	72	-	51.4
Index violent	91	-	65.0
Index post-legislation	91	-	65.0

Note: $N = 140$. SD = standard deviation.

The judicial sentencing decisions included the individuals found to be DOs (with varying penalties levied), as well as individuals not found to be DOs but received an LTO designation. The July 2, 2008 date is relevant as it marks the date of the enactment of Bill C-27, which amended the *Criminal Code* (1985) concerning preventative detention hearings. A series of hearings ($n = 49$, 35%) occurred after July 2, 2008 but the index offence occurred prior to the enactment of Bill C-27 and thus the law applied was in accordance with the index offence date. Appeal decisions were coded with respect to the final outcome only if there is an original sentencing decision available to code. Therefore, the participants consisted of original whole DO hearings where experts provided testimony and a sentencing decision was rendered, along with any relevant appeal information.

The cases were pulled from four jurisdictions including British Columbia (*n* = 49, 35%), Alberta (*n* = 23, 16.4%), Saskatchewan (*n* = 50, 35.7%), and Manitoba (*n* = 18, 12.9%). The majority took place at the Queen's Bench/Superior Court level (*n* = 92, 65.7%) and referenced the new legislation (*n* = 96, 68.6%). Psychiatrists made up 65.0% (*n* = 91) of the Court-appointed affiliation and 29.1% (*n* = 16) of the Defence affiliation. Less than one-half of the cases obtained a Defence expert (*n* = 55, 39.3%). There were 38 different experts that testified on behalf of the Court with the most frequent expert (a psychiatrist) testifying 29 times (20.7%) and the next frequent 16 times (11.4%). The remaining experts testified seven times or less. There were 22 different experts that testified on behalf of the Defence with the most frequent expert (a psychologist) testifying 21 times (15%). The remaining experts testified four times or less. Thirteen experts were noted to have testified for both the Court and the Defence depending on the individual case.

The majority of the time the outcome resulted in a designation of a DO (*n* = 114, 81.4%) and an indeterminate sentence (*n* = 88, 62.9%). No decisions resulted in a determinate sentence only and 37.1% (*n* = 52) received a determinate sentence with an LTSO. The mean length of the determinate sentence in months was 108.6 (*SD* = 47.1), with mean credit for time served of 46.5 (*SD* = 25.6) months, and a mean LTSO of 109.4 (*SD* = 20.9) months. An appeal was filed in half the cases (*n* = 71, 50.7%) and three-quarters of the appeals were upheld (*n* = 53, 74.6%). Table 3 presents the important expert, hearing, and outcome characteristics. The cases were heard by 114 different judicial decision makers with two judicial decision makers each hearing three cases, 22 judicial decision makers hearing two cases, and the remainder only presiding over one case. The mean length of the judicial sentencing decision was 50.66 (*SD* = 32.0) pages and ranged from 11 pages to 163 pages (including appendices).

Table 3

Expert, Hearing, and Outcome Characteristics

Measure	*n*	Mean (*SD*)	Frequency (%)
Expert Characteristics			
Court affiliation – Psychiatrist	91	-	65.0
Defence affiliation – Psychiatrist	55	-	29.1
Defence expert obtained	55	-	39.3
Hearing and Decision Characteristics			
Jurisdiction – British Columbia	49	-	35.0
Jurisdiction – Alberta	23	-	16.4
Jurisdiction – Saskatchewan	50	-	35.7
Jurisdiction – Manitoba	18	-	12.9
Level of court – Queen's Bench/Superior	92	-	65.7
Law referenced – post-legislation change	96	-	68.6
Designation outcome – DO	114	-	81.4
Penalty outcome – indeterminate	88	-	62.9
Length of determinate sentence (months)		108.6 (47.1)	-
Credit for time served (months)		46.5 (25.6)	-
Length of LTSO (months)		109.4 (20.9)	-
Length of sentencing decision (pages)		50.7 (32.0)	-
Appeal			
Appeal filed	71	-	50.7
Appeal outcome – upheld	53	-	74.6

Note: N = 140. SD = standard deviation. DO = Dangerous Offender. LTSO = Long-Term Supervision Order

In terms of risk assessment instruments noted, the judicial decision makers noted risk-relevant instruments by the Court-appointed expert 71.4% (*n* = 100) of the time; whereas, they only noted risk-relevant instruments by the Defence expert 58.2% (*n* = 32) of the time. Of the Court-appointed experts' risk-relevant instruments noted, there were 14 different instruments utilized with the most common being the PCL-R (*n* = 73, 73.0%), followed by the HCR-20 (*n* = 45, 45.0%), VRAG (*n* = 43, 43.0%), and an instrument in the STATIC family (i.e., STATIC-99, STATIC 99R, STATIC 2002, or STATIC 2002R) (*n* = 41, 41.0%). Of the Defence experts' risk-relevant instruments noted, there were 11 different instruments utilized with the most common being the PCL-R (*n* = 17, 53.1%), an instrument from the STATIC family (i.e., STATIC-99, STATIC-99R, STATIC 2002, or STATIC 2002R) (*n* = 14, 43.8%), the VRS (*n* = 9, 28.1%), and LSI-R (*n* = 9, 28.1%). Table 4 contains the complete breakdown of all the instruments noted.

Table 4

Risk Assessment Instruments Noted

Risk Assessment Instrument	Court-Appointed Expert (*n* = 100)		Defence Expert (*n* = 32)	
	n	%	*n*	%
HCR-20	45	45.0	5	15.6
LS/CMI	4	4.0	1	3.1
LSI-R	1	1.0	9	28.1
PCL-R	73	73.0	17	53.1
RSVP	11	11.0	2	6.3
SARA	9	9.0	1	3.1
SIR	1	1.0	-	-
SORAG	20	20.0	-	-
STABLE	3	3.0	1	3.1
Static family	41	41.0	14	43.8
SVR-20	12	12.0	-	-
VRAG	43	43.0	7	21.9
VRS	2	2.0	9	28.1
VRS-SO	2	2.0	7	21.9

Note: HCR-20 = Historical Clinical Risk-20. LS/CMI = Level of Service/Case Management Inventory. LSI-R = Level of Service Inventory-Revised. PCL-R = Psychopathy Checklist-Revised. RSVP = Risk for Sexual Violence Protocol. SARA = Spousal Assault Risk Assessment (Kropp & Gibas, 2010). SIR = Statistical Information on Recidivism. SORAG = Sex Offender Risk Appraisal Guide. SVR-20 = Sexual Violence Risk-20 (Hart & Boer, 2010). VRAG = Violence Risk Appraisal Guide. VRS = Violence Risk Scale. VRS-SO = Violence Risk Scale-Sex Offender (Wong et al., 2003).

2.3.3 Data Collection and Protocol

The source of information for gathering judicial decision makers' written and oral judgments was the Canadian Legal Information Institute (CanLII). CanLII is an online database that offers free public access to over 2.4 million documents across more than 300 case law and legislative databases, including historic cases to enrich existing databases. It is used by lawyers, legal professionals, and the general public. CanLII provides judicial decision makers' written reasons for judgment or transcripts of judicial decision makers' oral conclusions from all Canadian provincial, territorial, and national jurisdictions. CanLII indicates that the database does not contain a percentage of the lower courts that provide judgments; however, this did not significantly impact this study as DO hearings typically take place at the higher court level. The search term, "dangerous offender," along with a filter for the date was used to find all DO

hearings from July 2, 2008 to July 2, 2018. As noted previously, the written decisions were only obtained if they were original whole DO hearings, including cases that may be overturned later by appeal or hearings as a result of previous successful appeals. The written decisions varied widely in length and detail; situational factors and the personal preferences of the individual judicial decision makers (i.e., judicial decision makers have their own style in terms of how they write and what they focus on in their decisions, as well as whether there was an agreement by the parties prior to the commencement of the hearing) affected what information was available.

A data collection protocol (see Appendix A) was developed for the collection of information regarding several key variables required for exploring the proposed areas of examination of this study. Key variables included defendant characteristics, expert characteristics and content of experts' testimony noted, and hearing and written sentencing decision characteristics. The first section of the data collection protocol contained items pertaining to the individual undergoing the preventative detention hearing and included such variables as their age, ethnicity, information about the index offence, their prior convictions, history of a youth record, history of sexual offences, any prior failures on community supervision, their education level, any gang affiliation, substance use issues, as well as adverse childhood experiences and other mental health, cognitive, or personality diagnoses.

The second section of the data collection protocol contained items pertaining to the expert and the content of their testimony (as noted by the judicial decision maker). Key variables included their affilation, credentials, the actual risk scales utilized, the style of their risk communication, as well as their ratings of risk judgment, treatment amenability, and manageability of their risk in the community. Moreover, this section also included the whether or not the judicial decision maker noted the expert spoke about static, dynamic, and protective factors. In the cases where multiple experts were presented, the Court-appointed expert was selected as the first expert and the Defence expert, if present, was selected as the second expert. At times, there may be a second expert for the prosecution, that was included but not specifically analyzed. It is important to highlight that the information gathered under this section in particular may not represent what the expert actually said or wrote but an interpretation and selection of it by the judicial decision maker.

The third section of the data collection protocol contained characteristics of the judicial decision maker's perceptions and ultimate outcome. Key variables included the judicial decision

maker presiding over the matter, the jurisdiction, year of decision, level of Court, designation outcome, penalty outcome (along with details of any determinate and LTSO lengths), the judicial decision makers' perceptions of risk, treatment amenability, and risk management in the community. Further, it also included the judicial decision makers' overall reliance on the experts' evidence, if one expert was preferred, and basic details about whether an appeal was filed and the outcome of same (if known). Appeal outcomes were coded up to July 2021 in an attempt to gather as much data as possible.

2.3.4 Procedure

The researcher accessed the free online database and entered the search term and date filter to narrow the results. A total of 612 legal cases were identified. At that point, each decision was briefly opened and reviewed to see if it met the criteria for inclusion. If the decision met the inclusion criteria, the .pdf (if available) was downloaded, saved, and printed for review. Inclusion criteria were as follows: adult, male, decision written in English, original preventative sentencing decision, and the decision rendered between July 2, 2008 and July 2, 2018. Moreover, only decisions from British Columbia, Alberta, Saskatchewan, and Manitoba were obtained. Once the inclusion criteria were applied, a total of 140 cases remained for analysis. If the decision did not meet the criteria for inclusion, it was not downloaded. Reasons for exclusion included: female, written in French, the decision pertained to a preliminary hearing, and/or the decision was not a preventative detention sentencing decision (e.g., it mentioned the terms "dangerous offender" but was not in the context of a preventative detention hearing). The free online database was searched for appeal decisions up to and including July 26, 2021.

After collection of all available decisions from July 2, 2008 to July 2, 2018 in the four Canadian provinces, the researcher enlisted the assistance of two trained independent coders to complete the inter-rater reliability (10 cases; 7.1%). Ten cases were randomly selected and shared with the two independent coders. Training was completed and the results of the inter-rater reliability were analyzed. The researcher then coded the entire dataset. All data was stored in and analyzed using SPSS.

2.3.5 Data Preparation and Planned Analyses

After all the data was collected and entered into SPSS some variables were collapsed into either dichotomous or trichotomous variables due to small cell counts and to make the resulting analyses more informative. For example, the year of index offence variable was collapsed into a dichotomous variable (pre-legislation change, post-legislation change) in order to capture the effect (if any) of the legislation change. Ethnicity was collapsed into a dichotomous variable (Indigenous, Non-Indigenous) in order to capture the effect (if any) of ethnicity in its association with any of the risk and sentencing variables. Further, the risk judgment variables were collapsed into both dichotomous variables (very high/high, moderate or lower) and trichotomous variables (very high, high, moderate or lower). Finally, the treatment amenability variables were collapsed into dichotomous variables (not low, low) and the risk management variables were collapsed into dichotomous variables (can be managed, cannot be managed).

Data analysis entailed the used of descriptive statistics, chi-squared analyses, crosstabulations, analysis of variance (ANOVA), and binary logistic regressions. Descriptive analyses were conducted on the individual, expert, hearing, and outcome characteristics, as well as the risk assessment instruments noted. Chi-squared analyses and crosstabulations were utilized to examine bivariate associations among sentencing, legislation, risk, treatment, and ethnicity variables. For all analyses, a measure of the magnitude of the effect was calculated along with the 95% confidence interval. If the 95% confidence intervals for the odds ratios does not include one, the comparison is statistically significant at the .05 level. Cramer's *V* was utilized as the effect size indicator (values under .20 are small, those between .20 and .30 are moderate, and those over .30 are strong; Field, 2010). For odds ratios, 0.5 was added to each cell to avoid empty cells (Fleiss, 1994).

Hypothesis 1 was tested by using a series of crosstabulations to determine if the judicial decision makers' interpretation of the experts' ratings of risk, treatment amenability, and risk management in the community are related to designation and penalty outcomes. Hierarchical logistic regressions were also conducted in an effort to see if the judicial decision makers' interpretation of the experts' ratings of risk, treatment amenability, and risk management in the community contribute to designation and penalty outcomes. Hypotheses 2 was tested by using a series of crosstabulations to determinate if partisanship exists between the Court-appointed and Defence experts (according to the judicial decision makers' interpretations). Moreover, binary

logistic regressions were completed to determine if the judicial decision makers' interpretation of one experts' ratings were favored over other ratings with respect to designation and penalty outcomes. Hypotheses 3 and 4 were tested by using a series of crosstabulations to determine if the judicial decision makers' interpretion of the experts' discussion of static, dynamic, and protective factors are related to designation and penalty outcomes (Hypothesis 3), as well as to examine the potential effect of the 2008 legislation change on designation and penalty outcomes (Hypothesis 4). Hypothesis 5 was tested by using crosstabulations to determine if ethnicity is related to any other key outcome variable. In this case, the data was stratified by ethnicity (Indigenous, Non-Indigenous) and then a series of key variables investigated. An ANOVA was also conducted for Hypothesis 5 in an effort to see if ethnicity was related to designation and penalty outcomes.

Additional ancillary analyses were conducted with regard to jurisdictional biases and other variables including ethnicity, designation, and penalty outcomes. The analyses were stratified by jurisdiction, which included descriptive statistics as well as crosstabulations to examine possible relationships. There were no hypotheses with respect to these ancillary analyses and they were conducted primarily for interest and relevance to the overall study.

2.3.6 Inter-Rater Reliability

To examine the integrity of data collection, reliability analyses were conducted. As noted, 10 randomly selected cases were independently coded by two raters to establish inter-rater reliability. The inter-rater reliability of the continuous/count variables were evaluated using absolute agreement intraclass correlation coefficients (ICCs). Using the well-established magnitude criteria of Cicchetti et al. (2006) in which values equal to or greater than .60 are considered acceptable, the ICC values for the continuous/count variables were strong and ranged from .674 to 1.00. The categorical variables were evaluated using Cohen's kappa (κ). Using the well-established magnitude criteria of McHugh (2012) in which values equal to or greater than .60 are considered acceptable. However, Landis & Koch (1977) indicate that values equal to or greater than .41 are considered acceptable. The kappa values for the categorical variables were generally strong and ranged from .211 to 1.00. Two kappa values were considered unacceptable, Risk Judgement of Expert 2 ($\kappa = .211$) and judicial decision maker's Perception of Risk ($\kappa = .348$). It is believed that these two variables had lower than expected inter-rater reliability due to this subsample containing shorter than the average page count and few defence expert details

resulting in fewer details to rate. Table 5 presents the interrater reliability statistics for continuous/count variables: absolute agreement single measure intraclass correlation coefficients.

Table 5

Interrater Reliability Statistics for Continuous/Count Variables: Absolute Agreement Single Measure Intraclass Correlation Coefficients

Variable	Cronbach's Alpha	ICC (Kappa)
Year of Birth	.983	0.966
Age at Hearing	1.00	1.00
Age at Index	1.00	1.00
Ethnicity	-	1.00
Year of Index	-	(.886)
Sexual Index Offence	-	(1.00)
Number of Sexual Index Offences	1.00	1.00
Violent Index Offence	-	(1.00)
Number of Violent Index Offences	.674	.459
Number of Prior Convictions	1.00	1.00
Youth Record	-	(.412)
Age at First Offence	1.00	1.00
Prior Sexual Offences	-	(1.00)
Number of Prior Sexual Convictions	.941	.896
Prior Failure on Community Supervision	-	(1.00)
Highest Level of Supervision	-	(1.00)
Gang Affiliation	-	(1.00)
Substance Use Issues	-	(1.00)
Adverse Childhood Experiences	-	(1.00)
Other Experiences	-	(1.00)
Number of Experts	1.00	-
Expert 1 Affiliation	-	(1.00)
Expert 1 Credential	-	(1.00)
Expert 2 Affiliation	-	(1.00)
Expert 2 Credential	-	(1.00)
Expert 1 Categorical	-	(1.00)
Expert 1 Narrative	-	(1.00)
Expert 1 Percentiles/Percentages	-	(1.00)
Expert 1 Range	-	(1.00)
Expert 1 Raw Score	-	(1.00)
Expert 2 Categorical	-	(1.00)
Expert 2 Narrative	-	(1.00)
Expert 2 Percentiles/Percentages	-	(1.00)
Expert 2 Range	-	(1.00)
Expert 2 Raw Score	-	(1.00)

Risk Judgment Expert 1	-	(.559)
Risk Judgment Expert 2	-	(.211)
Treatment Amenability Expert 1	-	(1.00)
Treatment Amenability Expert 2	-	(.545)
Risk Management Expert 1	-	(.692)
Risk Management Expert 2	-	(.667)
Static vs. Dynamic Expert 1	-	(.600)
Static vs. Dynamic Expert 2	-	(.000)
Dynamic Factors Expert 1	-	(1.00)
Dynamic Factors Expert 2	-	(1.00)
Protective Factors Expert 1	-	(.200)
Protective Factors Expert 2	-	(.000)
Jurisdiction	-	(1.00)
Year of Decision	-	(1.00)
Level of Court	-	(1.00)
Law Referenced	-	(1.00)
Designation Outcome	-	(1.00)
Penalty Outcome	-	(1.00)
Length of Determinate Sentence	1.00	1.00
Credit for Time Served	1.00	1.00
Length of Long-Term Supervision Order	1.00	1.00
Length of Sentencing Decision	1.00	1.00
Judge's Perceptions of Risk	-	(.348)
Judge's Perceptions of Treatment Amenability	-	(.811)
Judge's Perceptions of Risk Management	-	(1.00)
Judge's Overall Reliability on Experts	-	(.615)
Judge's Expert Preference	-	(1.00)
Which Expert was Preferred	-	(1.00)
Appeal Filed	-	(1.00)
Year of Appeal	-	(.800)
Appeal Outcome	-	(1.00)

Note: $N = 10$. ICC = intraclass correlation coefficient.

CHAPTER 3: RESULTS

3.1 Expert Ratings and Final Outcomes

3.1.1 Court-Appointed Expert and Designation Outcome

The judicial decision makers' interpretation of the Court-appointed experts' ratings of risk, treatment amenability, and risk management in the community were examined with respect to designation outcome (i.e., DO or LTO). As noted previously, low cell counts required some variables to be collapsed into dichotomous and trichotomous variables in an effort to find the most informative trends. A series of crosstabulations were conducted to examine the relationship between the designation outcome and the judicial decision makers' interpretation of the Court-appointed experts' ratings on the three assessment areas; that is, risk judgment, treatment amenability, and risk management in the community.

First, the judicial decision makers' interpretation of the Court-appointed experts' ratings of risk were analyzed and it was found that the Court-appointed experts' ratings of risk were not significantly related to, and had a small association with, designation outcome, χ^2 (2, 140) = 4.377, p = .112, Cramer's V = .177. However, a clear pattern appeared in which higher ratings of risk were more likely to receive a DO designation compared to lower ratings of risk. The data show that when the judicial decision makers interpreted the Court-appointed experts' ratings of an individual's risk as "very high," 93% of the time that individual was designated a DO rather than an LTO. When the judicial decision makers interpreted the Court-appointed experts' ratings of an individual's risk as "moderate or lower," only 67% of the time that individual was designated a DO. Table 6 presents the results regarding the judicial decision makers' interpretation of the Court-appointed experts' ratings of risk and designation outcome.

Table 6

Crosstabulation of the Judicial Decision Makers' Interpretation of the Court-Appointed Experts' Risk Judgment with Designation Outcome

		DO		LTO	
		n	%	*n*	%
Court-appointed experts' risk judgment	Very High	13	92.9	1	7.1
	High	87	82.9	18	17.1
	Moderate or lower	14	66.7	7	33.3
Total		114	81.4	26	18.6

Note: χ^2 (2, 140) = 4.377[a], p = .112, Cramer's V = .177. DO = Dangerous Offender. LTO = Long-Term Offender.

[a] 2 cells (33.3%) have expected count less than 5. The minimum expected count is 2.60.

Second, the judicial decision makers' interpretation of the Court-appointed experts' ratings of treatment amenability were analyzed and it was found that the Court-appointed experts' ratings of treatment amenability were not significantly related to, and had a small association with, designation outcome, χ^2 (2, 140) = 4.000, p = .135, Cramer's V = .169. However, a clear pattern appeared wherein when judicial decision makers interpreted higher ratings of treatment amenability, the individuals were less likely to receive a DO designation compared to when lower ratings of treatment amenability were interpreted. The data show that when the judicial decision makers interpreted the Court-appointed experts' ratings of an individual's treatment amenability as "high," 67% of the time they received a DO designation compared to 86% of the time when the individual's treatment amenability is rated as "low." Table 7 presents the results regarding the judicial decision makers' interpretation of the Court-appointed experts' ratings of treatment amenability and designation outcome.

Table 7

Crosstabulation of the Judicial Decision Makers' Interpretation of the Court-Appointed Experts' Treatment Amenability with Designation Outcome

		DO		LTO	
		n	%	*n*	%
Court-appointed experts' treatment amenability	High	4	66.7	2	33.3
	Moderate	34	73.9	12	26.1
	Low	76	86.4	12	13.6
Total		114	81.4	26	18.6

Note: χ^2 (2, 140) = 4.000[a], p = .135, Cramer's V = .169. DO = Dangerous Offender. LTO = Long-Term Offender.

[a] 2 cells (33.3%) have expected count less than 5. The minimum expected count is 1.11.

Third, the judicial decision makers' interpretation of the Court-appointed experts' ratings of risk management in the community were analyzed and it was found that the Court-appointed experts' ratings of risk management in the community were significantly related to, and had a moderate association with, designation outcome, χ^2 (1, 140) = 7.421, p = .006, Cramer's V = .230. The data show that when the judicial decision makers interpreted the Court-appointed experts' ratings of an individual's risk management in the community as manageable, 73% of the time the individual received a DO designation compared to receiving a DO designation 91% of the time when the individual's risk management in the community is rated as not manageable. It is noted that there tended to be considerable evidence presented in the sentencing hearings from other "experts" regarding program options and community supports that may have also influenced judicial decision makers' decisions in this particular regard. Table 8 presents the results regarding the judicial decision makers' interpretation of the Court-appointed experts' ratings of risk management in the community and designation outcome.

Table 8

Crosstabulation of the Judicial Decision Makers' Interpretation of the Court-Appointed Experts' Risk Management in the Community with Designation Outcome

		DO		LTO	
		n	%	*n*	%
Court-appointed experts' risk management	Can be managed	54	73.0	20	27.0
	Cannot be managed	60	90.9	6	9.1
Total		114	81.4	26	18.6

Note: χ^2 (1, 140) = 7.421[a], p = .006, Cramer's V = .230. DO = Dangerous Offender. LTO = Long-Term Offender.

[a] 0 cells (.0%) have expected count less than 5. The minimum expected count is 12.26.

3.1.2 Court-Appointed Expert and Penalty Outcome

The judicial decision makers' interpretation of the experts' ratings of risk, treatment amenability, and risk management in the community were also examined with respect to penalty outcome (i.e., indeterminate or determinate with an LTSO). The penalty variable was thought to be a more informative outcome measure as there is more discretion in the law at this stage of the sentencing process, particularly since the 2008 legislation change. As noted previously, low cell counts required some variables to be collapsed into dichotomous and trichotomous variables in an effort to find the most informative trends. A series of crosstabulations were conducted to examine the relationship between penalty outcome and the judicial decision makers' interpretation of the Court-appointed experts' ratings on the three assessment areas; that is, risk judgment, treatment amenability, and risk management in the community.

First, the judicial decision makers' interpretation of the Court-appointed experts' ratings of risk are significantly related to, and moderately associated with, penalty outcome, χ^2 (2, 140) = 9.974, p = .007, Cramer's V = .267. Generally, the higher the risk rating by the Court-appointed expert (as interpreted by the judicial decision maker), the higher the likelihood of an individual receiving an indeterminate sentence and the lower the risk rating, the higher the likelihood of the individual receiving a determinate sentence with an LTSO. The data show that when the judicial decision makers interpreted the Court-appointed experts' ratings of an individual's risk as "very high," that individual received an indeterminate sentence 79% of the time. When the judicial decision makers interpreted the Court-appointed experts' ratings of an individual's risk as "moderate or lower," that individual received an indeterminate sentence only

33% of the time. Table 9 presents the results regarding the judicial decision makers' interpretation of the Court-appointed experts' risk judgment and penalty outcome.

Table 9

Crosstabulation of the Judicial Decision Makers' Interpretation of the Court-Appointed Experts' Risk Judgment with Penalty Outcome

		Indeterminate		Determinate with LTSO	
		n	%	*n*	%
Court-appointment experts' risk judgment	Very High	11	78.6	3	21.4
	High	70	66.7	35	33.3
	Moderate or lower	7	33.3	14	66.7
Total		88	62.9	52	37.1

Note: χ^2 (2, 140) = 9.974[a], p = .007, Cramer's V = .267. LTSO = Long-Term Supervision Order.
[a] 0 cells (.0%) have expected count less than 5. The minimum expected count in 5.20.

Second, the judicial decision makers' interpretation of the Court-appointed experts' ratings of treatment amenability were analyzed and it was found that the Court-appointed experts' ratings of treatment amenability were significantly related to, and strongly associated with, penalty outcome, χ^2 (2, 140) = 37.062, $p < .001$, Cramer's V = .515. Generally, the higher the treatment amenability rating (according to the judicial decision maker), the lower the likelihood that the individual will receive an indeterminate sentence and the lower the rating of treatment amenability, the more likely the individual will receive an indeterminate sentence. The data show that when the judicial decision makers interpreted the Court-appointed experts' ratings of an individual's treatment amenability as "high," the individual received an indeterminate sentence only 17% of the time compared to 82% of the time when the individual's treatment amenability was rated as "low." Table 10 presents the results regarding the judicial decision makers' interpretation of the Court-appointed experts' ratings of treatment amenability and penalty outcome.

Table 10

Crosstabulation of the Judicial Decision Makers' Interpretation of the Court-Appointed Experts' Treatment Amenability with Penalty Outcome

		Indeterminate		Determinate with LTSO	
		n	%	*n*	%
Court-appointed experts' treatment amenability	High	1	16.7	5	83.3
	Moderate	15	32.6	31	67.4
	Low	72	81.8	16	18.2
Total		88	62.9	52	37.1

Note: χ^2 (2, 140) = 37.062[a], $p < .001$, Cramer's $V = .515$. LTSO = Long-Term Supervision Order.

[a] 2 cells (33.3%) have expected count less than 5. The minimum expected count is 2.23.

Third, the judicial decision makers' interpretation of the Court-appointed experts' ratings of risk management in the community were analyzed and it was found that the Court-appointed experts' ratings of risk management in the community were significantly related to, and strongly associated with, penalty outcome, χ^2 (1, 140) = 37.662, $p < .001$, Cramer's $V = .519$. Generally, when the judicial decision makers interpreted the Court-appointed experts' ratings of the individual's risk as manageable in the community, the individual was more likely to receive a determinate sentence with an LTSO than when the Court-appointed expert rated the individual's risk as not manageable in the community. When the judicial decision makers interpreted the Court-appointed experts' ratings of an individual's risk as manageable in the community, the individual was given an indeterminate sentence 39% of the time whereas when the Court-appointed expert rated the individual as not manageable in the community, the individual received an indeterminate sentence 89% of the time. Table 11 presents the results regarding the judicial decision makers' interpretation of the Court-appointed experts' ratings of risk management in the community and penalty outcome.

Table 11

Crosstabulation of the Judicial Decision Makers' Interpretation of the Court-Appointed Experts' Risk Management in the Community with Penalty Outcome

		Indeterminate		Determinate with LTSO	
		n	%	*n*	%
Court-appointed experts' risk management	Can be managed	29	39.2	45	60.8
	Cannot be managed	59	89.4	7	10.6
Total		88	62.9	52	37.1

Note: χ^2 (1, 140) = 37.662[a], $p < .001$, Cramer's $V = .519$. LTSO = Long-Term Supervision Order.

[a] 0 cells (.0%) have expected count less than 5. The minimum expected count is 24.51.

To further clarify and refine the results, a binary logistic regression was completed to investigate which Court-appointed expert rating (as interpreted by the judicial decision makers), if any, has more influence on penalty outcome. The predictor variables, the judicial decision makers' interpretation of the Court-appointed experts' ratings of risk judgment, treatment amenability, and risk management in the community, were tested a priori to verify there was no violation of the assumption of the linearity of the logit. The predictor variable, the judicial decision makers' interpretation of the Court-appointed experts' ratings of risk judgment, treatment amenability, and risk management in the community, in the binary logistic regression analysis were all found to contribute to the model, χ^2 (3, 140) = 54.740, $p < .001$. The data show that the judicial decision makers' interpretation of the Court-appointed experts' risk judgment rating does not attain significance with respect to penalty outcome but the Court-appointed experts' ratings of treatment amenability and risk management in the community are both significant with respect to penalty outcome.

Overall, when the judicial decision makers interpreted higher risk judgments, the more likely the individual received an indeterminate sentence compared to a lower risk judgment. Further, the judicial decision makers' interpretation of the Court-appointed experts' ratings of treatment amenability and risk management in the community contribute incrementally above the Court-appointed experts' risk judgment but not the other way around. It was found that when the judicial decision makers interpretation of the Court-appointed experts' ratings of treatment amenability and risk management in the community are controlled for, individuals who are rated

moderate risk or lower are less likely to get an indeterminate sentence than if they were rated high or very high risk. If the judicial decision makers interpretation of the Court-appointed experts' ratings of an individual's risk is high or very high there is a 323% increase in the odds the individual will receive an indeterminate sentence. However, if an individual is considered treatment amenable, there is a 74% decrease in odds that they will be given an indeterminate sentence. Further, when the individual's risk is deemed manageable in the community, there is an 84% decrease in odds that they will be provided an indeterminate sentence. Table 12 presents the results regarding which Court-appointed experts' ratings (as interpreted by the judicial decision makers), if any, has more influence on penalty outcome.

Table 12

Binary Logistic Regression of the Judicial Decision Makers' Interpretation of the Court-Appointed Experts' Ratings of Risk Judgment, Treatment Amenability, and Risk Management in the Community with Penalty Outcome

	Regression model by penalty outcome					
Regression model outcome	*β*	*SE*	Wald	*p*	Exp(B)	95% CL [LL, UL]
Constant	2.833	1.074	6.952	.008	16.996	
Court-appointed experts' risk judgment	1.174	.635	3.421	.064	3.234	[.932, 11.221]
Court-appointed experts' treatment amenability	-1.362	.476	8.198	.004	.256	[.101, .651]
Court-appointed experts' risk management	-1.861	.525	12.578	< .001	.156	[.056, .435]

Note: χ^2 (3, 140) = 54.740, $p < .001$. CI = confidence interval. LL = lower limit. UL = upper limit.

3.1.3 Defence Expert and Designation Outcome

Given that Defence experts are hired specifically by the Defendant and are not Court-appointed, their ratings of overall risk, treatment amenability, and risk management in the community (as interpreted by judicial decision makers) were also examined with respect to designation outcome (i.e., DO or LTO). As noted previously, low cell counts required some variables to be collapsed into dichotomous and trichotomous variables in an effort to find the

most informative trends. A series of crosstabulations were conducted to examine the relationship between designation outcome and the judicial decision makers' interpretation of the Defence experts' ratings on the three assessment areas; that is, risk judgment, treatment amenability, and risk management in the community.

First, the judicial decision makers' interpretation of the Defence experts' ratings of risk were analyzed and it was found that the Defence experts' ratings of risk are not significantly related to, although had a moderate association with, designation outcome, χ^2 (1, 55) = 3.769, p = .052, Cramer's V = .262. The general trend appearing is similar to the Court-appointed expert in that the higher the rating of risk (as interpreted by the judicial decision makers), the more likely the individual will be designated a DO and the lower the rating of risk the less likely that the individual will be designated a DO. The data show that when the judicial decision makers interpreted the Defence experts' ratings of an individual's risk as "very high or high," that individual is designated a DO 92% of the time and when the Defence experts rate an individual's risk as "moderate or lower," 72% of the time the individual is designated a DO. Table 13 presents the results regarding the judicial decision makers' interpretation of the Defence experts' risk judgment and designation outcome.

Table 13

Crosstabulation of the Judicial Decision Makers' Interpretation of the Defence Experts' Risk Judgment with Designation Outcome

		DO		LTO	
		n	%	*n*	%
Defence experts' risk judgment	Very High/High	34	91.9	3	8.1
	Moderate or lower	13	72.2	5	27.8
Total		47	85.5	8	14.5

Note: χ^2 (1, 55) = 3.769[a], p = .052, Cramer's V = .262. DO = Dangerous Offender. LTO = Long-Term Offender.

[a] 1 cell (25.0%) has expected count less than 5. The minimum expected count is 2.62.

Second, the judicial decision makers' interpretation of the Defence experts' ratings of treatment amenability were analyzed and it was found that the Defence experts' ratings of treatment amenability are significantly related to, and moderately associated with, designation outcome, χ^2 (1, 55) = 4.188, p = .041, Cramer's V = .276. Generally, the higher the rating of treatment amenability by the Defence expert (as interpreted by the judicial decision makers), the

less likely the individual will receive a DO designation. The data show that when the judicial decision makers interpret the Defence experts' ratings of an individual's treatment amenability as "not low" 79% of the time the individual received a DO designation compared to 100% of the time when the Defence experts' rate the individual's treatment amenability as "low." This result speaks to the importance of the Defence experts' opinions (as interpreted by the judicial decision makers) in the sense that if they also feel the individual is low in treatment amenability then the likelihood of the individual's success in terms of change is not hopeful and the judicial decision maker is more likely to designate them as a DO. Table 14 presents the results regarding the judicial decision makers' interpretation of the Defence experts' ratings of treatment amenability and designation outcome.

Table 14

Crosstabulation of the Judicial Decision Makers' Interpretation of the Defence Experts' Treatment Amenability with Designation Outcome

		DO		LTO	
		n	%	*n*	%
Defence experts' treatment amenability	Not low	30	78.9	8	21.1
	Low	17	100.0	0	0.0
Total		47	85.5	8	14.5

Note: χ^2 (1, 55) = 4.188[a], p = .041, Cramer's V = .276. DO = Dangerous Offender. LTO = Long-Term Offender.

[a] 1 cell (25.0%) has expected count less than 5. The minimum expected count is 2.47.

Third, the judicial decision makers' interpretation of the Defence experts' ratings of risk management in the community were analyzed and it was found that the Defence experts' ratings of risk management in the community are not significantly related to, nor associated with, designation outcome, χ^2 (1, 55) = .056, p = .814, Cramer's V = .032. No trend appeared with respect to this analysis and the judicial decision makers' interpretation of the Defence experts' ratings of risk management in the community were not meaningful in terms of designation outcome. The data show that when the Defence expert rates an individual's risk management in the community as manageable (as interpreted by the judicial decision makers), 86% of individuals received a DO designation compared to 83% when the Defence experts rate the individual's risk management in the community as not manageable. Table 15 presents the results

regarding the judicial decision makers' interpretation of the Defence experts' rating of risk management in the community and designation outcome.

Table 15

Crosstabulation of the Judicial Decision Makers' Interpretation of the Defence Experts' Risk Management in the Community with Designation Outcome

		DO		LTO	
		n	%	*n*	%
Defence experts' risk management	Can be managed	37	86.0	6	14.0
	Cannot be managed	10	83.3	2	16.7
Total		47	85.5	8	14.5

Note: χ^2 (1, 55) = .056[a], p = .814, Cramer's V = .032. DO = Dangerous Offender. LTO = Long-Term Offender.

[a] 1 cell (25.0%) has expected count less than 5. The minimum expected count is 1.75.

3.1.4 Defence Expert and Penalty Outcome

Judicial decision makers' interpretation of the Defence experts' ratings of risk, treatment amenability, and risk management in the community were also examined with respect to penalty outcome (i.e., indeterminate or determinate with an LTSO). The penalty variable was thought to be a more informative outcome measure as there is more discretion in the law at this stage of the sentencing process, particularly since the 2008 legislation change. As noted previously, low cell counts required some variables to be collapsed into dichotomous and trichotomous variables in an effort to find the most informative trends. A series of crosstabulations were conducted to examine the relationship between penalty outcome and the judicial decision makers' interpretation of the Defence experts' ratings on the three assessment areas; that is, risk judgment, treatment amenability, and risk management in the community.

First, the judicial decision makers' interpretation of the Defence experts' ratings of risk were analyzed and it was found that the Defence experts' ratings of risk are significantly related to, and strongly associated with, penalty outcome, χ^2 (1, 55) = 8.351, p = .004, Cramer's V = .390. Generally, the higher the rating of risk by the Defence expert (as interpreted by the judicial decision makers), the more likely the individual will receive an indeterminate sentence compared to a determinate sentence with an LTSO. The data show that when the judicial decision makers interpret the Defence experts' ratings of an individual's risk as "very high or high," 78% of the time the individual will receive an indeterminate sentence compared to 39% of the time when the

Defence expert rates an individual's risk as "moderate or lower." Table 16 presents the results regarding the judicial decision makers' interpretation of the Defence experts' risk judgment and penalty outcome.

Table 16

Crosstabulation of Judicial Decision Makers' Interpretation of the Defence Experts' Risk Judgment with Penalty Outcome

		Indeterminate		Determinate with LTSO	
		n	%	*n*	%
Defence experts' risk judgment	Very High/High	29	78.4	8	21.6
	Moderate or lower	7	38.9	11	61.1
Total		36	65.5	19	34

Note: χ^2 (1, 55) = 8.351[a], p = .004, Cramer's V = .390. LTSO = Long-Term Supervision Order.
[a] 0 cells (.0%) have expected count less than 5. The minimum expected count is 6.22.

Second, the judicial decision makers' interpretation of the Defence experts' ratings of treatment amenability were analyzed and it was found that the Defence experts' ratings of treatment amenability were significantly related to, and strongly associated with, penalty outcome, χ^2 (1, 55) = 12.986, p < .001, Cramer's V = .486. As seen with the designation outcome, the general trend is that the higher the Defence experts' rating of treatment amenability (as interpreted by the judicial decision makers), the less likely the individual will receive an indeterminate sentence. However, if the judicial decision makers interpret the Defence experts' ratings of an individual's treatment amenability as low, then the chances of an indeterminate sentence being ordered is extremely likely.

The data show that when the judicial decision makers' interpretation of the Defence experts' ratings of an individual's treatment amenability as "not low," 50% of the time the individual received an indeterminate sentence compared to an 100% of the time receiving an indeterminate sentence when the individual's treatment amenability is rated as "low." This result speaks to the importance of the Defence expert's opinion (as interpreted by the judicial decision makers) in the sense that if they also feel the individual is low in treatment amenability then the likelihood of the individual's success in terms of change is not hopeful and the judicial decision maker is more likely to give them to an indeterminate sentence. Table 17 presents the results

regarding the judicial decision makers' interpretation of the Defence experts' rating of treatment amenability and penalty outcome.

Table 17

Crosstabulation of Judicial Decision Makers' Interpretation of the Defence Experts' Treatment Amenability with Penalty Outcome

		Indeterminate		Determinate with LTSO	
		n	%	*n*	%
Defence experts' treatment amenability	Not low	19	50.0	19	50.0
	Low	17	100.0	0	0.0
Total		36	65.5	19	34.5

Note: χ^2 (1, 55) = 12.986[a], $p < .001$, Cramer's $V = .486$. LTSO = Long-Term Supervision Order.
[a] 0 cells (.0%) have expected count less than 5. The minimum expected count is 5.87.

Third, the judicial decision makers' interpretation of the Defence experts' ratings of risk management in the community were analyzed and it was found that the Defence experts' ratings of risk management were not significantly related to, although moderately associated with, sentencing outcome, χ^2 (1, 55) = 2.170, $p = .141$, Cramer's $V = .199$. The trend that is noted is when the Defence expert rates the individual as manageable in the community (as interpreted by the judicial decision makers) there is a higher likelihood that the individual will receive a determinate sentence with an LTSO and if the Defence expert rates the individual as not manageable in the community than there is a much higher likelihood that the individual will receive an indeterminate sentence. The data show that when the judicial decision makers' interpretation of the Defence experts' ratings of an individual's risk manageable in the community, 61% of the time the individual received an indeterminate sentence compared to 83% of the time the individual will receive an indeterminate sentence if the individual's risk is rated as not manageable in the community. Table 18 presents the results regarding the judicial decision makers' interpretation of the Defence experts' rating of risk management in the community and penalty outcome.

Table 18

Crosstabulation of the Judicial Decision Makers' Interpretation of the Defence Experts' Risk Management in the Community with Penalty Outcome

		Indeterminate		Determinate with LTSO	
		n	%	*n*	%
Defence experts' risk management	Can be managed	26	60.5	17	39.5
	Cannot be managed	10	83.3	2	16.7
Total		36	65.5	19	34.5

Note: χ^2 (1, 55) = 2.170[a], p = .141; Cramer's V = .199. LTSO = Long-Term Supervision Order.
[a] 1 cell (25.0%) has expected count less than 5. The minimum expected count is 4.15.

To further clarify and refine the results, a binary logistic regression was completed to investigate which Defence experts' ratings (as interpreted by judicial decision makers), if any, have more influence on penalty outcome. The predictor variables, the judicial decisions makers' interpretation of the Defence experts' ratings of risk judgment, treatment amenability, and risk management in the community, were tested a priori to verify there was no violation of the assumption of the linearity of the logit. The predictor variables, the judicial decision makers' interpretation of the Defence experts' ratings of risk judgment, treatment amenability, and risk management in the community, in the binary logistic regression analysis were all found to contribute to the model, χ^2 (3, 55) = 19.507, $p < .001$. The data show that the judicial decision makers' interpretation of the Defence experts' risk judgment and risk management in the community variables are not significant with respect to penalty outcome but the Defence experts' treatment amenability variable is significant with respect to penalty outcome. Table 19 presents the results regarding which Defence experts' ratings (as interpreted by the judicial decision makers), if any, has more influence on penalty outcome.

Overall, the higher the Defence experts' risk judgment (as interpreted by the judicial decision makers) the more likely the individual will receive an indeterminate sentence compared to a lower risk judgment. It was found that when the judicial decision makers' interpretation of the Defence experts' ratings of treatment amenability and risk management in the community are controlled for, individuals who are rated moderate risk or lower are less likely to get an indeterminate sentence than if they were rated high or very high risk. If the judicial decision makers interpreted the Defence experts' ratings of an individual's risk as high or very high there is a 247% increase in the odds the individual will receive an indeterminate sentence. However, if

an individual is considered treatment amenable, there is an 89% decrease in odds that they will be given an indeterminate sentence. Further, when the individual's risk is deemed manageable in the community, there is a 46% decrease in odds that they will be given an indeterminate sentence. Table 19 presents the results regarding which Defence experts' ratings (as interpreted by the judicial decision makers), if any, has more influence on penalty outcome.

Table 19

Binary Logistic Regression of Judicial Decision Makers' Interpretation of the Defence Experts' Ratings of Risk Judgment, Treatment Amenability, and Risk Management in the Community with Penalty Outcome

	Regression model by penalty outcome					
Regression model outcome	*B*	*SE*	Wald	*p*	Exp(B)	95% CL [LL, UL]
Constant	1.602	1.656	.935	.334	4.961	
Defence experts' risk judgment	.904	.616	2.157	.142	2.470	[.739, 8.254]
Defence experts' treatment amenability	-2.177	.844	6.652	.010	.113	[.022, .593]
Defence experts' risk management	-.614	.920	.446	.504	.541	[.089, 3.283]

Note: χ^2 (3, 55) = 19.507, $p < .001$; CI = confidence interval; LL = lower limit; UL = upper limit.

3.2 Presence of Partisanship

The 2008 legislation change continued to attempt to address partisanship when it continued to require only one expert risk assessment on behalf of the Court. However, it is not uncommon to have multiple risk assessments presented in a DO hearing (Blais, 2015). A series of crosstabulations were conducted to examine the relationship between the Court-appointed and Defence experts (as interpreted by the judicial decision makers) with respect to the three primary areas of assessment; that is, risk judgment, treatment amenability, and risk management in the community. As noted previously, low cell counts required some variables to be collapsed into dichotomous and trichotomous variables in an effort to find the most informative trends.

First, it was found that the judicial decision makers' interpretation of the Court-appointed experts' ratings of risk judgment were significantly related to, strongly associated with, the judicial decision makers' interpretation of the Defence experts' ratings of risk judgment, χ^2 (1, 55) = 18.209, $p < .001$, Cramer's $V = .575$. The data show that when the judicial decision makers interpret the Court-appointed experts' ratings of an individual's risk as "very high or high," the Defence expert is in agreement 80% of the time. When the Court-appointed expert rates an individual's risk as "moderate or lower" (as interpreted by the judicial decision makers), the Defence expert was in agreement 90% of the time. Overall, this speaks to a high level of agreement between the Court-appointed and Defence experts on the risk judgment variable (as interpreted by the judicial decision maker). This is not surprising as most individuals involved in the criminal justice system undergoing a preventative detention hearing are expected to be a higher risk (even though they are not any higher risk than other individuals not facing preventative detention hearings (e.g., Nicholaichuk et al., 2013)). Moreover, many of the same actuarial instruments are utilized which, if completed according to the rating manuals, should result in comparable levels of risk judgment. Table 20 presents the results regarding the judicial decision makers' interpretation of the Court-appointed experts' risk judgment rating with the Defence experts' risk judgment rating.

Table 20

Crosstabulation of Judicial Decision Makers' Interpretation of the Court-Appointed Experts' Risk Judgment with Defence Experts' Risk Judgment

		Defence experts' risk judgment			
		Very High/High		Moderate or lower	
		n	%	*n*	%
Court-appointed experts' risk judgment	Very High/High	36	80.0	9	20.0
	Moderate or lower	1	10.0	9	90.0
Total		37	67.3	18	32.7

Note: χ^2 (1, 55) = 18.209[a], $p < .001$, Cramer's $V = .575$. $\kappa = .534$, $p < .001$.
[a] 1 cell (25.0%) has expected count less than 5. The minimum expected count is 3.27.

Second, it was found that the judicial decision makers' interpretation of the Court-appointed experts' ratings of treatment amenability were significantly related to, and strongly

associated with, Defence experts' ratings of treatment amenability, χ^2 (1, 55) = 16.404, $p < .001$, Cramer's $V = .546$. The data show that when the judicial decision makers interpreted the Court-appointed experts' ratings of an individual's treatment amenability as "not low," the Defence experts are in agreement 100% of the time. When the Court-appointed experts rate an individual's treatment amenability as "low," the Defence experts were in agreement 52% of the time (as interpreted by judicial decision makers). This result appears to speak to some partisanship with respect to treatment amenability in that the Defence experts tend to feel there is overall a higher level of treatment amenability than Court-appointed experts. Moreover, treatment amenability is more subjective and there are no risk assessment instruments that specifically address it, and thus there is a higher likelihood of discordance to arise. Table 21 presents the results regarding the judicial decision makers' interpretation of the Court-appointed experts' ratings of treatment amenability with the Defence experts' ratings of treatment amenability.

Table 21

Crosstabulation of the Judicial Decision Makers' Interpretation of the Court-Appointed Experts' Treatment Amenability with Defence Experts' Treatment Amenability

		Defence expert treatment amenability			
		Not low		Low	
		n	%	*n*	%
Court-appointed expert treatment amenability	Not low	22	100.0	0	0.0
	Low	16	48.5	17	51.5
Total		38	69.1	17	30.9

Note: χ^2 (1, 55) = 16.404[a], $p < .001$; Cramer's $V = .546$. $\kappa = .459$, $p < .001$.
[a] 0 cells (.0%) have expected count less than 5. The minimum expected count is 6.80.

Third, it was found that the judicial decision makers' interpretation of the Court-appointed experts' ratings of risk management in the community were significantly related to, and strongly associated with, Defence experts' ratings of risk management in the community, χ^2 (1, 55) = 12.136, $p < .001$, Cramer's $V = .461$. The data show that when the judicial decision makers' interpretation of the Court-appointed experts' ratings of an individual's risk as manageable in the community, the Defence experts are in agreement 97% of the time. When the

Court-appointed experts rate an individual's risk as not manageable in the community (as interpreted by judicial decision makers), the Defence experts were in agreement only 42% of the time. This result also appears to speak to some partisanship with respect to risk management in the community in that the Defence experts tend to feel the individual is likely to be managed in the community more than Court-appointed experts. Further, risk management in the community, as with treatment amenability, is more subjective and not directly measured by risk assessment instruments, and thus there is a higher likelihood of discordance to arise. Table 22 presents the results regarding the judicial decision makers' interpretation of the Court-appointed experts' ratings of risk management in the community with the Defence experts' ratings of risk management in the community.

Table 22

Crosstabulation of the Judicial Decision Makers' Interpretation of the Court-Appointed Experts' Risk Management with Defence Experts' Risk Management in the Community

		Defence experts' risk management			
		Can be managed		Cannot be managed	
		n	%	*n*	%
Court-appointed experts' risk management	Can be managed	28	96.6	1	3.4
	Cannot be managed	15	57.7	11	42.3
Total		43	78.2	12	21.8

Note: χ^2 (1, 55) = 12.136[a], $p < .001$; Cramer's $V = .470$; $\kappa = .461$, $p < .001$.
[a] 0 cells (.0%) have expected count less than 5. The minimum expected count is. 5.67.

To further clarify and refine the results, a binary logistic regression analysis to investigate which, if either, expert has more influence on penalty outcome in terms of their assessment of risk judgment was conducted (as interpreted by judicial decision makers). The predictor variable, judicial decision makers' interpretation of experts' ratings of risk judgment, was tested a priori to verify there was no violation of the assumption of the linearity of the logit. The predictor variable, judicial decision makers' interpretation of experts' ratings of risk judgment, in the binary logistic regression analysis was found to significantly contribute to the model, χ^2 (2, 55) = 11.152, $p = .004$.

It was found that both the Court-appointed and Defence experts' ratings of risk judgment (as interpreted by judicial decision makers) are generally predictive of penalty outcome. However, the data do not support that either expert (as interpreted by judicial decision makers) uniquely predicts penalty outcome. The pattern that appears seems to provide support that the Court-appointed expert has slightly more influence than the Defence expert, given that the odds ratio is nearly double (i.e., 4.095 vs. 2.671). This result is not surprising given the fact that risk judgment is not significantly related to penalty outcome and the fact that the two experts tend to have a high degree of concordance when assessing risk (as interpreted by judicial decision makers). Moreover, risk judgments are less subjective and thus there is a lower likelihood of discordance to arise. Table 23 presents the results regarding which experts' risk judgment ratings, if either, has more influence on penalty outcome (as interpreted by judicial decision makers).

Table 23

Binary Logistic Regression of the Judicial Decision Makers' Interpretation of the Court-Appointed and Defence Experts' Ratings of Risk Judgment with Penalty Outcome

	Regression model by penalty outcome					
Regression model outcome	β	*SE*	*Wald*	*p*	*Exp(B)*	95% CL [LL, UL]
Constant	-3.719	1.016	13.384	< .001	.024	
Court-appointed experts' risk judgment	1.410	.747	3.563	.059	4.095	[.947, 17.705]
Defence experts' risk judgment	.982	.632	2.416	.120	2.671	[.774, 9.216]

Note: χ^2 (2, 55) = 11.152, p = .004; CI = confidence interval; LL = lower limit; UL = upper limit.

To further clarify and refine the results, a further binary logistic regression analysis to investigate which, if either, expert has more influence on sentencing outcome in terms of their assessment of treatment amenability (as interpreted by judicial decision makers) was conducted. The predictor variable, judicial decision makers' interpretation of experts' ratings of treatment amenability, was tested a priori to verify there was no violation of the assumption of the linearity of the logit. The predictor variable, judicial decision makers' interpretation of experts' ratings of

treatment amenability, in the binary logistic regression analysis was found to significantly contribute to the model, χ^2 (2, 55) = 25.207, $p < .001$.

It was found that both the Court-appointed and Defence experts' ratings of treatment amenability (as interpreted by judicial decision makers) are generally predictive of penalty outcome. However, the data only support that the judicial decision makers' interpretation of the Court-appointed experts' ratings of treatment amenability uniquely predicted penalty outcome. The effect with respect to the judicial decision makers' interpretation of the Defence experts' ratings of treatment amenability had very similar odds ratio and approached significance. A positive rating of treatment amenability by the Court-appointed expert (as interpreted by judicial decision makers) was uniquely associated with an 85% decrease in the odds of receiving an indeterminate sentence, while concordant ratings of positive treatment amenability by the Defence expert was associated with an 80% decrease in the odds of such an outcome. Overall, the data support that both experts (as interpreted by judicial decision makers) appear to contribute uniquely to the prediction of penalty outcome; however, it appears as though the Court-appointed expert is incrementally predictive but the Defence expert is not incrementally predictive of penalty outcome. That is, it appears that the Court-appointed expert is being given more weight than the Defence expert, but the Defence expert does still get some weight by judicial decision makers. Table 24 presents the results regarding which experts' rating of treatment amenability (as interpreted by judicial decision makers), if either, has more influence on penalty outcome.

Table 24

Binary Logistic Regression of the Judicial Decision Makers' Interpretation of the Court-Appointed and Defence Experts' Ratings of Treatment Amenability with Penalty Outcome

	Regression model by penalty outcome					
Regression model outcome	*B*	*SE*	Wald	*p*	Exp(B)	95% CL [LL, UL]
Constant	4.358	1.187	13.483	< .001	78.067	
Court-appointed experts' treatment amenability	-1.906	.681	7.838	.005	.149	[.039, .565]
Defence experts' treatment amenability	-1.626	.888	3.351	.067	.197	[.034, 1.122]

Note: χ^2 (2, 55) = 25.207, $p < .001$; CI = confidence interval; LL = lower limit; UL = upper limit.

To further clarify and refine the results, a binary logistic regression analysis to investigate which, if either, expert has more influence on penalty outcome in terms of their assessment of risk management in the community (as interpreted by judicial decision makers) was conducted. The predictor variable, judicial decision makers' interpretation of the experts' ratings of risk management in the community, was tested a priori to verify there was no violation of the assumption of the linearity of the logit. The predictor variable, judicial decision makers' interpretation of the experts' rating of risk management in the community, in the binary logistic regression analysis was found to significantly contribute to the model, χ^2 (2, 55) = 19.496, $p < .001$.

It was found that only the judicial decision makers' interpretation of the Court-appointed experts' ratings of risk management in the community were uniquely predictive of penalty outcome. When risk was assessed as manageable by the Court-appointed experts (as interpreted by judicial decision makers), this was uniquely associated with a 93% decrease in the odds of an indeterminate sentence in contrast to 1.4% for the Defence experts' rating of risk management. That is, the data support that the Court-appointed expert's conclusion on risk management in the community would appear to overrule the Defence expert's conclusion (as interpreted by judicial decision makers). Table 25 presents the results regarding which experts' rating of risk management in the community (as interpreted by judicial decision makers), if either, has more influence on penalty outcome.

Table 25

Binary Logistic Regression of the Judicial Decision Makers' Interpretation of the Court-Appointed and Defence Experts' Ratings of Risk Management in the Community with Penalty Outcome

	Regression model by penalty outcome					
Regression model outcome	*β*	*SE*	*Wald*	*p*	*Exp(B)*	95% CL [LL, UL]
Constant	2.821	1.081	6.808	.009	16.798	
Court-appointed experts' risk management	-2.584	.837	9.527	.002	.075	[.015, .389]
Defence experts' risk management	-.014	1.040	.000	.989	.986	[.129, 7.567]

Note: χ^2 (2, 55) = 19.496, $p < .001$; CI = confidence interval; LL = lower limit; UL = upper limit.

3.3 Presence of Static, Dynamic, and Protective Factors

3.3.1 Court-appointed Expert and Designation Outcome

Research supports dynamic and protective factors as being influential in assessing an individual's risk level, as well as treatment amenability and risk management in the community (Bonta & Andrews, 2017). However, it has also been found that less than half of all assessments in preventative detention hearings contained information on dynamic or protective factors (Blais & Forth, 2014). As noted previously, it is important to remember that the data collected was what was contained in the written judicial sentencing decision and at the discretion of the individual judicial decision maker and not necessarily what was contained in the expert's report. A series of crosstabulations were conducted to examine the relationship, if any, between the judicial decision makers' interpretation of the Court-appointed experts' distinction between static and dynamic factors.

First, a crosstabulation of the judicial decision makers' interpretation of the Court-appointed experts' distinction between static and dynamic factors and designation outcome was conducted. It was found that the judicial decision makers' interpretation of the Court-appointed experts' distinction between static and dynamic factors were not significantly related to, and are only weakly associated with, designation outcome, χ^2 (1, 140) = 2.687, $p = .101$, Cramer's $V =$

.139. The data show that 78% of the time the Court-appointed experts noted the difference between static and dynamic factors (as interpreted by judicial decision makers) the individual was designated a DO. Table 26 presents the results regarding the judicial decision makers' interpretation of the Court-appointed experts' distinction between static and dynamic factors and designation outcome.

Table 26

Crosstabulation of the Judicial Decision Makers' Interpretation of the Court-Appointed Experts' Static vs. Dynamic Distinction with Designation Outcome

		DO		LTO	
		n	%	*n*	%
Court-appointed experts' static vs. dynamic distinction	Yes	73	77.7	21	22.3
	No	41	89.1	5	10.9
Total		114	81.4	26	18.6

Note: χ^2 (1, 140) = 2.687[a], p = .101, Cramer's V = .139, κ = -.129, p = .101. DO = Dangerous Offender. LTO = Long-Term Offender.
[a] 0 cells (.0%) have expected count less than 5. The minimum expected count is 8.54.

Second, a crosstabulation of the judicial decision makers' interpretation of the Court-appointed experts' discussion of dynamic factors and designation outcome was conducted. It was found that the judicial decision makers' interpretation of the Court-appointed experts' discussion of dynamic factors were not significantly related to, and are only weakly associated with, designation outcome, χ^2 (1, 140) = 1.935, p = .164, Cramer's V = .118. The data show that 80% of the time the Court-appointed expert noted dynamic factors (as interpreted by the judicial decision maker) the individual was designated a DO and 100% of the time they did not note dynamic factors the individual was designated a DO. The discussion around dynamic factors tended to focus on personality factors which, in turn, tended to be seen as not dynamic but static in nature (e.g., psychopathic and antisocial traits are not treatable). Table 27 presents the results regarding the judicial decision makers' interpretation of the Court-appointed experts' notation of dynamic factors and designation outcome.

Table 27

Crosstabulation of the Judicial Decision Makers' Interpretation of the Court-Appointed Experts' Dynamic Factors Noted with Designation Outcome

		DO		LTO	
		n	%	*n*	%
Court-appointed experts' dynamic factors noted	Yes	106	80.3	26	19.7
	No	8	100.0	0	0.0
Total		114	81.4	26	18.6

Note: χ^2 (1, 140) = 1.935[a], p = .164; Cramer's V = .118; κ = -.096, p = .164. DO = Dangerous Offender. LTO = Long-Term Offender.

[a] 1 cell (25.0%) has expected count less than 5. The minimum expected count is 1.49.

Third, a crosstabulation of the judicial decision makers' interpretation of the Court-appointed experts' discussion of protective factors and designation outcome was conducted. It was found that the judicial decision makers' interpretation of the Court-appointed experts' discussion of protective factors were not significantly related to, nor associated with, designation outcome, χ^2 (1, 140) = 1.134, p = .287, Cramer's V = .090. The data show that 90% of the time the Court-appointed experts noted protective factors (as interpreted by the judicial decision makers) the individual was designated a DO and 80% of the time they did not note protective factors the individual was designated a DO. It is noted that protective factors were not commonly noted in the sentencing decisions and, when they were noted, they were deemed to be insufficient to override other risk information. The focus within risk assessments appears to continue to be on risk factors and not protective factors. Table 28 presents the results regarding the judicial decision makers' interpretation of the Court-appointed experts' notation of protective factors and designation outcome.

Table 28

Crosstabulation of the Judicial Decision Makers' Interpretation of the Court-Appointed Experts' Protective Factors Noted with Designation Outcome

		DO		LTO	
		n	%	*n*	%
Court-appointed experts' protective factors noted	Yes	18	90.0	2	10.0
	No	96	80.0	24	20.0
Total		114	81.4	26	18.6

Note: χ^2 (1, 140) = 1.134[a] , p = .287; Cramer's V = .090; κ = .034, p = .101. DO = Dangerous Offender. LTO = Long-Term Offender.

[a] 1 cell (25.0%) has expected count less than 5. The minimum expected count is 3.71.

3.3.2 Court-appointed Expert and Penalty Outcome

When considering penalty outcome with respect to the judicial decision makers' interpretation of the Court-appointed experts' recognition of static, dynamic, and protective factors, a series of crosstabulations were conducted to examine if a relationship exists. First, a crosstabulation of the judicial decision makers' interpretation of the Court-appointed experts' discussion of static and dynamic factors was conducted. It was found that the judicial decision makers' interpretation of the Court-appointed experts' distinction between static and dynamic factors were not significantly related to, and only weakly associated with, penalty outcome, χ^2 (1, 140) = .603, p = .437, Cramer's V = .118. The data show that 61% of the time the Court-appointed experts noted the difference between static and dynamic factors (as interpreted by the judicial decision maker) the individual was given an indeterminate sentence and 67% of the time the Court-appointed expert did not note the difference between static and dynamic factors the individual was given an indeterminate sentence. Table 29 presents the results regarding the judicial decision makers' interpretation of the Court-appointed experts' notation of static versus dynamic factors and penalty outcome.

Table 29

Crosstabulation of the Judicial Decision Makers' Interpretation of the Court-Appointed Experts' Static vs. Dynamic Distinction with Penalty Outcome

		Indeterminate		Determinate LTSO	
		n	%	*n*	%
Court-appointed experts' static vs. dynamic distinction	Yes	57	60.6	36	39.4
	No	31	67.4	15	32.6
Total		88	62.9	52	37.1

Note: χ^2 (1, 140) = .603[a], p = .437, Cramer's V = .118, κ = -.096, p = .437. LTSO = Long-Term Supervision Order.

[a] 0 cells (.0%) have expected count less than 5. The minimum expected count is 17.09.

Second, a crosstabulation of the judicial decision makers' interpretation of the Court-appointed experts' discussion of dynamic factors and penalty outcome was conducted. It was found that the judicial decision makers' interpretation of the Court-appointed experts' discussion of dynamic factors was not significantly related to, and only weakly associated with, penalty outcome, χ^2 (1, 140) = 2.207, p = .137, Cramer's V = .126. The data show that 61% of the time the Court-appointed expert noted the dynamic factors (as interpreted by the judicial decision makers) the individual was given an indeterminate sentence and 88% of the time they did not note dynamic factors the individual was given an indeterminate sentence. As previously mentioned, when dynamic factors were noted by the expert, the focus tended to be on personality factors that are believed to be challenging to change. Table 30 presents the results regarding the judicial decision makers' interpretation of the Court-appointed experts' notation of dynamic factors and penalty outcome.

Table 30

Crosstabulation of the Judicial Decision Makers' Interpretation of the Court-Appointed Experts' Dynamic Factors Noted with Penalty Outcome

		Indeterminate		Determinate LTSO	
		n	%	*n*	%
Court-appointed experts' dynamic factors noted	Yes	81	61.4	51	38.6
	No	7	87.5	1	12.5
Total		88	62.9	52	37.1

Note: χ^2 (1, 140) = 2.207[a], p = .137, Cramer's V = .126; κ = -.073, p = .437. LTSO = Long-Term Supervision Order.

[a] 1 cell (25.0%) has expected count less than 5. The minimum expected count is 2.97.

Third, a crosstabulation of the judicial decision makers' interpretation of the Court-appointed experts' discussion of protective factors and penalty outcome was conducted. It was found that the judicial decision makers' interpretation of the Court-appointed experts' discussion of protective factors were not significantly related to, nor associated with, penalty outcome, χ^2 (1, 140) = .046, p = .830, Cramer's V = .018. The data show that 65% of the time the Court-appointed experts noted the protective factors (as interpreted by the judicial decision maker) the individual was given an indeterminate sentence and 63% of the time they did not note protective factors the individual was given an indeterminate sentence. This result appears to speak to the potential impact of protective factors on overall risk, treatment amenability, and risk management in the community. Table 31 presents the results regarding the judicial decision makers' interpretation of the Court-appointed experts' notation of protective factors and penalty outcome.

Table 31

Crosstabulation of the Judicial Decision Makers' Interpretation of the Court-Appointed Experts' Protective Factors Noted with Penalty Outcome

		Indeterminate		Determinate LTSO	
		n	%	*n*	%
Court-appointed experts' protective factors noted	Yes	13	65.0	7	35.0
	No	75	62.5	45	37.5
Total		88	62.9	52	37.1

Note: χ^2 (1, 140) = .046[a], p = .830, Cramer's V = .018; κ = .010, p = .437. LTSO = Long-Term Supervision Order.

[a] 0 cells (.0%) have expected count less than 5. The minimum expected count is 7.43.

3.3.3 Defence Expert and Designation Outcome

When considering the judicial decision makers' interpretation of the Defence experts' discussion of static, dynamic, and protective factors with respect to designation outcome, a series of crosstabulations were conducted to examine if a relationship exists. First, a crosstabulation of the judicial decision makers' interpretation of the Defence experts' discussion of static and dynamic factors was conducted. It was found that the judicial decision makers' interpretation of the Defence-appointed experts' distinction between static and dynamic factors were not significantly related to, nor associated with, designation outcome, χ^2 (1, 55) = .076, p = .783, Cramer's V = .037. The data show that 85% of the time the Defence experts noted the difference between static and dynamic factors (as interpreted by the judicial decision makers) the individual was designated a DO and 88% of the time the Defence experts did not note the difference between static and dynamic factors the individual was designated a DO. The distinction between static and dynamic factors does not influence designation outcome. Table 32 presents the results regarding the judicial decision makers' interpretation of the Defence experts' distinction between static and dynamic factors and designation outcome.

Table 32

Crosstabulation of the Judicial Decision Makers' Interpretation of the Defence Experts' Static vs. Dynamic Distinction with Designation Outcome

		DO		LTO	
		n	%	*N*	%
Defence experts' static vs. dynamic distinction	Yes	33	84.6	6	15.4
	No	14	87.5	2	12.5
Total		47	85.5	8	14.5

Note: χ^2 (1, 55) = .076[a], *p* = .783, Cramer's *V* = .037; κ = -.034, *p* = .783. DO = Dangerous Offender. LTO = Long-Term Offender.

[a] 1 cell (25.0%) has expected count less than 5. The minimum expected count is 2.33.

Second, a crosstabulation of the judicial decision makers' interpretation of the Defence experts' discussion of dynamic factors were conducted. It was found that the judicial decision makers' interpretation of the Defence experts' discussion of dynamic factors were not significantly related to, nor associated with, designation outcome, χ^2 (1, 55) = .379, *p* = .538, Cramer's *V* = .083. The data show that 86% of the time the Defence expert noted dynamic factors (as interpreted by the judicial decision makers) the individual was designated a DO and 75% of the time they did not note dynamic factors the individual was designated a DO. As noted, the discussion of an individual's dynamic factors tends to focus on the more unchangeable aspects (e.g., personality or cognitive capabilities). Table 33 presents the results regarding the judicial decision makers' interpretation of the Defence experts' discussion of dynamic factors and designation outcome.

Table 33

Crosstabulation of the Judicial Decision Makers' Interpretation of the Defence Experts' Dynamic Factors Noted with Designation Outcome

		DO		LTO	
		n	%	*n*	%
Defence experts' dynamic factors noted	Yes	44	86.3	7	13.7
	No	3	75.0	1	25.0
Total		47	85.5	8	14.5

Note: χ^2 (1, 55) = .379[a], *p* = .538, Cramer's *V* = .083; κ = .077, *p* = .538. DO = Dangerous Offender. LTO = Long-Term Offender.

[a] 2 cells (50.0%) have expected count less than 5. The minimum expected count is .58.

Third, a crosstabulation of the judicial decision makers' interpretation of the Defence experts' discussion of protective factors were conducted. It was found that the judicial decision makers' interpretation of the Defence experts' discussion of protective factors were not significantly related to, nor associated with, designation outcome, χ^2 (1, 55) = .149, p = .702, Cramer's V = .052. The data show that 82% of the time the Defence experts noted protective factors (as interpreted by the judicial decision makers) the individual was designated a DO and 86% of the time the Defence experts did not note protective factors the individual was designated a DO. The discussion of protective factors does not influence designation outcome. Table 34 presents the results regarding the judicial decision makers' interpretation of the Defence experts' discussion of protective factors and designation outcome.

Table 34

Crosstabulation of the Judicial Decision Makers' Interpretation of the Defence Experts' Protective Factors Noted with Designation Outcome

		DO		LTO	
		n	%	*n*	%
Defence experts' protective factors noted	Yes	9	81.8	2	18.2
	No	38	86.4	6	13.6
Total		47	85.5	8	14.5

Note: χ^2 (1, 55) = .146[a], p = .702, Cramer's V = .052; κ = -.020, p = .702. DO = Dangerous Offender. LTO = Long-Term Offender.

[a] 1 cell (25.0%) has expected count less than 5. The minimum expected count is 1.60.

3.3.4 Defence Expert and Penalty Outcome

When considering penalty outcome with respect to the judicial decision makers' interpretation of the Defence experts' recognition of static, dynamic, and protective factors, a series of crosstabulations were conducted to examine if a relationship exists. First, a crosstabulation of the judicial decision makers' interpretation of the Defence experts' discussion of static and dynamic factors was conducted. It was found that the judicial decision makers' interpretation of the Defence experts' distinction between static and dynamic factors are significantly related to, and have a moderate association with, penalty outcome, χ^2 (1, 55) = 4.850, p = .028, Cramer's V = .297. The data show that 56% of the time the Defence experts noted the difference between static and dynamic factors (as interpreted by the judicial decision

makers) the individual was given an indeterminate sentence and 88% of the time the Defence expert did not note the difference between static and dynamic factors the individual was given an indeterminate sentence. Review of the Defence experts' comments from the judicial sentencing decisions suggested that this result may be driven by the differentiation of age as a dynamic factor and the concept of "burnout" with respect to recidivism and adverse personality factors. The Defence experts appear much more likely to focus on these factors. Table 35 presents the results regarding the judicial decision makers' interpretation of the Defence experts' distinction between static and dynamic factors and penalty outcome.

Table 35

Crosstabulation of the Judicial Decision Makers' Interpretation of the Defence Experts' Static vs. Dynamic Distinction with Penalty Outcome

		Indeterminate		Determinate LTSO	
		n	%	*n*	%
Defence experts' static vs. dynamic distinction	Yes	22	56.4	17	43.6
	No	14	87.5	2	12.5
Total		36	65.5	19	34.5

Note: χ^2 (1, 55) = 4.850[a], p = .028, Cramer's V = .297; κ = -.295, p = .028. LTSO = Long-Term Supervision Order.

[a] 0 cells (.0%) have expected count less than 5. The minimum expected count is 5.53.

Second, a crosstabulation of the judicial decision makers' interpretation of the Defence experts' discussion of dynamic factors and penalty outcome was conducted. It was found that the judicial decision makers' interpretation of the Defence experts' discussion of dynamic factors were not significantly related to, nor associated with, penalty outcome, χ^2 (1, 55) = .174, p = .677, Cramer's V = .056. The data show that 65% of the time the Defence experts noted dynamic factors (as interpreted by the judicial decision makers) the individual was given an indeterminate sentence and 75% of the time they did not note dynamic factors the individual was given an indeterminate sentence. A basic discussion of dynamic factors by Defence experts (as interpreted by judicial decision makers) was not influential with respect to penalty outcome. Table 36 presents the results regarding the judicial decision makers' interpretation of the Defence experts' discussion of dynamic factors and penalty outcome.

Table 36

Crosstabulation of the Judicial Decision Makers' Interpretation of the Defence Experts' Dynamic Factors Noted with Penalty Outcome

		Indeterminate		Determinate LTSO	
		n	%	*n*	%
Defence experts' dynamic factors noted	Yes	33	64.7	18	35.3
	No	3	75.0	1	25.0
Total		36	65.5	19	34.5

Note: χ^2 (1, 55) = .174[a], p = .677, Cramer's V = .056; κ = -.038, p = .677. LTSO = Long-Term Supervision Order.

[a] 2 cells (50.0%) have expected count less than 5. The minimum expected count is 1.38.

Third, a crosstabulation of the judicial decision makers' interpretation of the Defence experts' discussion of protective factors and penalty outcome was conducted. It was found that the judicial decision makers' interpretation of the Defence experts' discussion of protective factors were not significantly related to, although moderately associated with, penalty outcome, χ^2 (1, 55) = 2.432, p = .119, Cramer's V = .210. The data show that 46% of the time the Defence expert noted protective factors (as interpreted by the judicial decision makers) the individual was given an indeterminate sentence and 71% of the time they did not note protective factors the individual was given an indeterminate sentence. This general trend appears to show that the discussion of protective factors by the Defence experts (as interpreted by judicial decision makers) are influencing outcomes. Table 37 presents the results regarding the judicial decision makers' interpretation of the Defence experts' discussion of the protective factors and penalty outcome.

Table 37

Crosstabulation of the Judicial Decision Makers' Interpretation of the Defence Experts' Protective Factors Noted with Penalty Outcome

		Indeterminate		Determinate LTSO	
		n	%	*n*	%
Defence experts' protective factors noted	Yes	5	45.5	6	54.5
	No	31	70.5	13	29.5
Total		36	65.5	19	34.5

Note: χ^2 (1, 55) = 2.432[a], p = .119, Cramer's V = .210; κ = -.135, p = .119. LTSO = Long-Term Supervision Order.

[a] 1 cell (25.0%) has expected count less than 5. The minimum expected count is 3.80.

3.4 Effect of 2008 Legislation Change

The effect of the 2008 legislation change has not yet been evaluated. It is hypothesized that the majority of DOs will receive indeterminate sentences rather than determinate sentences with LTSOs. In order to examine if a relationship between the 2008 legislation change and both designation and penalty outcome exists, a series of crosstabulations were conducted. First, a crosstabulation between the year of the index offence (pre- versus post-legislation change) and designation outcome was conducted. It was found that the year of the index offence (pre- versus post-legislation change) was not significantly related to, nor associated with, designation outcome, χ^2 (1, 140) = .002, p = .964, Cramer's V = .004. The data show that the same percentage of DO and LTO designations have occurred pre- and post-legislation change. The legislation change does not appear to have influenced the designation of a DO being assigned and it is postulated that this is due to the way the law is worded. That is, as noted previously, there is less discretion on behalf of the judicial decision maker when it comes to the criteria for assigning an individual a DO designation. Interestingly, the legislation change was noted by many judicial decision makers as creating more DO designations. Table 38 presents the results regarding the year of index (pre- versus post-legislation change) and designation outcome.

Table 38

Crosstabulation of Year of Index (Pre- versus Post-Legislation Change) with Designation Outcome

		DO		LTO	
		n	%	*n*	%
Year of index	Pre-legislation change	40	81.6	9	18.4
	Post-legislation change	74	81.3	17	18.7
Total		114	81.4	26	18.6

Note: χ^2 (1, 140) = .002[a], p = .964, Cramer's V = .004; κ = .002, p = .964. DO = Dangerous Offender. LTO = Long-Term Offender.

[a] 0 cells (.0%) have expected count less than 5. The minimum expected count is 9.10.

Second, a crosstabulation between the year of the index offence (pre- versus post-legislation change) and penalty outcome was conducted. It was found that the year of index (pre- versus post-legislation change) was significantly related to, and moderately associated with, penalty outcome, χ^2 (1, 140) = 9.042, p = .003, Cramer's V = .254 (Table 39). The data show that when the index offence was prior to the 2008 legislation change 80% of individuals facing a preventative detention hearing received an indeterminate sentence. However, only 54% of individuals received an indeterminate sentence when the index was after the 2008 legislation change.

This result is likely due to the 2008 legislation change as prior to the 2008 legislation change, once an individual was designated a DO (which is where the discretion was provided to the judicial decision maker), the judicial decision maker automatically had to sentence the individual to an indeterminate period of incarceration. However, under the new legislation, the discretion of the judicial decision maker was shifted to the penalty stage (rather than the designation stage) and thus, although judicial decision makers are providing more DO designations, they are exercising their discretion of the length of the sentence at penalty stage and assigning more determinate sentences with LTSOs. Essentially, DOs with determinate sentences and an LTSO are what would have been classified as an LTO with an LTSO pre-legislation change.

Table 39

Crosstabulation of Year of Index (Pre- versus Post-Legislation Change) with Penalty Outcome

		Indeterminate		Determinate with LTSO	
		n	%	*n*	%
Year of index	Pre-legislation change	39	79.6	10	20.4
	Post-legislation change	49	53.8	42	46.2
Total		88	62.9	52	37.1

Note: χ^2 (1, 140) = 9.042[a], p = .003, Cramer's V = .254; κ = .218, p = .003. LTSO = Long-Term Supervision Order.

[a] 0 cells (.0%) have expected count less than 5. The minimum expected count is 18.20.

3.5 Ethnicity

Given that, as of the end of the fiscal year 2018-2019, 35.5% of DOs in Canada have an Indigenous heritage (Public Safety Canada, 2020), analyses were completed on several variables to determine if racial ancestry is associated with DO sentencing decisions (Lloyd et al., 2010). A series of crosstabulations were conducted to examine the relationship, if any, between ethnicity and year of index offence (pre- versus post-legislation change), penalty outcome, and designation outcome. The data file was stratified by ethnicity into Indigenous versus Non-Indigenous individuals. First, a crosstabulation between year of index (pre- versus post-legislation change) and penalty outcome was conducted with respect to Non-Indigenous individuals. It was found that there is no significant relationship between, nor association with, year of index (pre- versus post-legislation change) and penalty outcome for Non-Indigenous individuals, χ^2 (1, 58) = 1.119, p = .290, Cramer's V = .139. The results suggest that the 2008 legislation change did not impact Non-Indigenous individuals with respect to whether or not they receive an indeterminate sentence. Table 40 presents the results regarding the year of index (pre- versus post-legislation change) and penalty outcome with respect to Non-Indigenous individuals.

Table 40

Crosstabulation of Year of Index (Pre- vs. Post-Legislation Change) with Penalty Outcome for Non-Indigenous Individuals

		Indeterminate		Determinate with LTSO	
		n	%	*n*	%
Year of index	Pre-legislation change	18	75.0	6	25.0
	Post-legislation change	21	61.8	13	38.2
Total		39	67.2	19	32.8

Note: χ^2 (1, 58) = 1.119[a], p = .290, Cramer's V = .139; κ = .121, p = .290. LTSO = Long-Term Supervision Order. Ethnicity collapsed = Non-Indigenous.

[a] 0 cells (.0%) have expected count less than 5. The minimum expected count is 7.86.

Second, a crosstabulation between year of index (pre- versus post-legislation change) and penalty outcome was conducted with respect to Indigenous individuals. It was found that there is a significant relationship between, and a strong association with, year of index (pre- versus post-legislation change) and penalty outcome for Indigenous individuals, χ^2 (1, 82) = 8.790, p = .003, Cramer's V = .327. It appears the 2008 legislation change has impacted Indigenous individuals facing a preventative detention hearing as 84% of Indigenous individuals received an indeterminate sentence prior to the 2008 legislation change whereas only 49% received an indeterminate sentence after the 2008 legislation change. Indigenous individuals now have an almost 50% chance of receiving a determinate sentence with an LTSO rather than an indeterminate sentence. Table 41 presents the results regarding the year of index (pre- versus post-legislation change) and penalty outcome with respect to Indigenous individuals.

Table 41

Crosstabulation of Year of Index (Pre- vs. Post-Legislation Change) with Penalty Outcome for Indigenous Individuals

		Indeterminate		Determinate with LTSO	
		n	%	*n*	%
Year of index	Pre-legislation change	21	84.0	4	16.0
	Post-legislation change	28	49.1	29	50.9
Total		49	59.8	33	40.2

Note: χ^2 (1, 82) = 8.790[a], *p* = .003, Cramer's *V* = .327; κ = .275, *p* = .003. LTSO = Long-Term Supervision Order. Ethnicity collapsed = Indigenous.
[a] 0 cells (.0%) have expected count less than 5. The minimum expected count is 10.06.

Third, a crosstabulation between year of index (pre- versus post-legislation change) and designation outcome was conducted with respect to Non-Indigenous individuals. It was found that there is no significant relationship between, and a small association with, year of index (pre- and post-legislation change) and designation outcome for Non-Indigenous individuals, χ^2 (1, 58) = 1.727, *p* = .189, Cramer's *V* = .173. Again, the results suggest that the 2008 legislation change did not impact Non-Indigenous individuals with respect to whether or not they are designated a DO. Table 42 presents the results regarding the year of index (pre- versus post-legislation change) and designation outcome for Non-Indigenous individuals.

Table 42

Crosstabulation of Year of Index (Pre- vs. Post-Legislation Change) with Designation Outcome for Non-Indigenous Individuals

		DO		LTO	
		n	%	*n*	%
Year of index	Pre-legislation change	18	75.0	6	25.0
	Post-legislation change	30	88.2	4	11.8
Total		48	82.8	10	17.2

Note: χ^2 (1, 58) = 1.727[a], *p* = .189, Cramer's *V* = .173; κ = -.115, *p* = .189. DO = Dangerous Offender. LTO = Long-Term Offender. Ethnicity collapsed = Non-Indigenous.
[a] 1 cell (25.0%) has expected count less than 5. The minimum expected count is 4.14.

Fourth, a crosstabulation between year of index (pre- versus post-legislation change) and designation outcome was conducted with respect to Indigenous individuals. It was found that there is no significant relationship between, and a small association with, year of index (pre- versus post-legislation change) and designation outcome for Indigenous individuals, χ^2 (1, 82) = 1.292, p = .256, Cramer's V = .126. This result appears to indicate that the 2008 legislation change has not impacted Indigenous individuals with respect to designation outcome as 88% of Indigenous individuals facing a preventative detention hearing received a DO designation prior to the 2008 legislation change and 77% received a DO designation after the 2008 legislation change. As noted, the 2008 legislation change created less discretion for judicial decision makers at the designation stage and thus it is not surprising that the change has not influenced the DO designations. Table 43 presents the results regarding the year of index (pre- versus post-legislation change) and designation outcome with respect to Indigenous individuals.

Table 43

Crosstabulation of Year of Index (Pre- vs. Post-Legislation Change) with Designation Outcome for Indigenous Individuals

		DO		LTO	
		n	%	*n*	%
Year of index	Pre-legislation change	22	88.0	3	12.0
	Post-legislation change	44	77.2	13	22.8
Total		66	80.5	16	19.5

Note: χ^2 (1 ,82) = 1.292[a], p = .256, Cramer's V = .126; κ = .074, p = .256. DO = Dangerous Offender. LTO = Long-Term Offender. Ethnicity collapsed = Indigenous.
[a] 1 cell (25.0%) has expected count less than 5. The minimum expected count is 4.88.

Fifth, a crosstabulation between ethnicity and penalty outcome was conducted to identify if a relationship exists. It was found that there was no significant relationship between, nor association with, penalty outcome, χ^2 (1, 140) = .815, p = .367, Cramer's V = .076. The results indicate that Non-Indigenous individuals received an indeterminate sentence 67% of the time and Indigenous individuals received indeterminate sentences 60% of the time. This suggests that Indigenous heritage on its own does not meaningfully predict whether an individual will receive an indeterminate sentence. Table 44 presents the results regarding ethnicity and penalty outcome.

Table 44

Crosstabulation of Ethnicity with Penalty Outcome

		Indeterminate		Determinate with LTSO	
		n	%	*n*	%
Ethnicity	Non-Indigenous	39	67.2	19	32.8
	Indigenous	49	59.8	33	40.2
Total		88	62.9	52	37.1

Note: χ^2 (1, 140) = .815[a], *p* = .367, Cramer's *V* = .076; κ = .070, *p* = .367. LTSO = Long-Term Supervision Order.

[a] 0 cells (.0%) have expected count less than 5. The minimum expected count is 21.54.

Sixth, a crosstabulation between ethnicity and designation outcome was conducted to identify if a relationship exists. It was found that there was no significant relationship between, nor association with, ethnicity and designation outcome, χ^2 (1, 140) = .116, *p* = .734, Cramer's *V* = .029. The results indicate that Non-Indigenous individuals received DO designations 83% of the time and Indigenous individuals received DO designations 81% of the time. This suggests that Indigenous heritage is unrelated to receiving a DO designation. Table 45 presents the results regarding the ethnicity and designation outcome.

Table 45

Crosstabulation of Ethnicity with Designation Outcome

		DO		LTO	
		n	%	*n*	%
Ethnicity	Non-Indigenous	48	82.8	10	17.2
	Indigenous	66	80.5	16	19.5
Total		114	81.4	26	18.6

Note: χ^2 (1, 140) = .116[a], *p* = .734, Cramer's *V* = .029; κ = .020, *p* = .734. DO = Dangerous Offender. LTO = Long-Term Offender.

[a] 0 cells (.0%) have expected count less than 5. The minimum expected count is 10.77.

A post-hoc analysis, two-way ANOVA, was conducted to examine if the differences between Indigenous and Non-Indigenous are significant. Confirming earlier results, the ANOVA shows that the differences between Indigenous and Non-Indigenous individuals with respect to sentencing outcome were significant only in regards to the year of the index offence (pre- versus

post-legislation change), $F(1, 140) = 8.122$, $p = .005$. Table 46 presents the results regarding ethnicity, year of index, and penalty outcome.

Table 46

Analysis of Variance: Dependent Variable: Penalty Outcome

Predictor	Sum of Squares	*df*	Mean Square	F	*p*
Corrected Model	2.551[a]	3	.850	3.837	.011
Intercept	218.484	1	218.484	986.023	.000
Ethnicity (Indigenous vs. Non-Indigenous)	.010	1	.010	.047	.830
Year of Index (pre- vs. post-legislation change)	1.800	1	1.800	8.122	.005
Ethnicity * Year of Index	.364	1	.364	1.643	.202
Error	30.135	136	.222		
Total	296.000	140			
Corrected Total	32.686	139			

Note: a. $R^2 = .078$ (Adjusted $R^2 = .058$).

3.6 Jurisdictional Differences

Additional ancillary analyses were conducted to explore whether jurisdiction plays a role in judicial sentencing decisions. As noted, there are noted discrepancies of the application of the preventative detention legislation throughout its history. In recent times, it is noted that Saskatchewan has the highest rates of DOs per 100,000 population and DOs over three times as many DOs per 100,000 population than any other province. Saskatchewan also has the highest proportion of Indigenous peoples per population alongside Manitoba. However, it is unknown what percentage of DOs in these provinces, for example, are Indigenous compared to other provinces and whether the ratio of DO applications is commensurate with the percent of Indigenous peoples in the population. A series of key variables were investigated with respect to jurisdiction, including experts involved, ethnicity, designation outcome, and penalty outcome. These analyses include descriptive statistics as well as crosstabulations to examine any such associations. There were no hypotheses with respect to these ancillary analyses and they were included out of interest and relevance to the overall study.

First, the data were stratified by jurisdiction and analyses were run for the 10-year period July 2, 2008 to July 2, 2018. With respect to ethnicity, it was found that, of the 49 cases from British Columbia, 32.7% ($n = 16$) were Indigenous individuals and 67.3% ($n = 33$) were on Non-

Indigenous individuals, while only 5.9% of British Columbia's population is of Indigenous descent. It was found that, of the 23 cases from Alberta, 43.5% (*n* = 10) were Indigenous individuals and 56.5% (*n* = 13) were Non-Indigenous individuals, while only 6.5% of Alberta's population is of Indigenous descent. Further, it was found that, of the 50 cases from Saskatchewan, 84.0% (*n* = 42) were Indigenous individuals and only 16.0% (*n* = 8) were Non-Indigenous individuals, while only 16.3% of Saskatchewan's population is of Indigenous descent. In regards to Manitoba, it was found that, of the 18 cases, 77.8% (*n* = 14) were Indigenous individuals and 22.2% (*n* = 4) were Non-Indigenous individuals, while only 15.5% of Manitoba's population is of Indigenous descent. These data appear to show not only significant discrepancies in which individuals (in terms of ethnicity) are being targeted across jurisdictions but also how disproportionate the number of Indigenous DO hearings are to the overall Indigenous population of these provinces. Overall, regardless of percentage of overall population of Indigenous peoples in these provinces, there is a disproportionate number of Indigenous individuals facing DO applications. Table 47 presents the results regarding ethnicity by jurisdiction.

Table 47

Ethnicity by Jurisdiction

Province	**Indigenous**		**Non-Indigenous**		**Indigenous Population (%)**
	n	%	*n*	%	
British Columbia	16	32.7	33	67.3	5.9
Alberta	10	43.5	13	56.5	6.5
Saskatchewan	42	84.0	8	16.0	16.3
Manitoba	14	77.8	4	22.2	15.5

Note: N = 140.

Second, with respect to the expert involved in each jurisdiction, it was found that British Columbia employed 15 different Court-appointed experts utilized between one and eight times and 14 different Defence experts utilized between one and four times. All (*n* = 15) the Court-appointed experts in British Columbia were from British Columbia and 85.7% (*n* = 12) of the Defence experts were from British Columbia. Eight (53.3%) experts in British Columbia testified for both the Court and Defence. Approximately half (*n* = 7, 46.7%) of the Court-appointed experts in British Columbia were psychiatrists and approximately half (*n* = 6, 42.9%) of the

Defence experts were psychiatrists. It was found that Alberta employed 14 different Court-appointed experts utilized between one and six times and 11 different Defence experts utilized between one and five times. All (*n* = 14) the Court-appointed experts in Alberta were from Alberta and 90.9% (*n* = 10) of the Defence experts were from Alberta. Three (21.4%) experts in Alberta have testified for both the Court and Defence. Approximately three-quarters (*n* = 10, 71.4%) of the Court-appointed experts in Alberta were psychiatrists and approximately a fifth (*n* = 2, 18.2%) of the Defence experts were psychiatrists.

It was found that Saskatchewan employed nine different Court-appointed experts utilized between one and 19 times and five different Defence experts utilized between one and 15 times. Approximately half (*n* = 4) of the Court-appointed experts in Saskatchewan were from Saskatchewan and 80.0% (*n* = 4) of the Defence experts were from Saskatchewan. Four (44.4%) experts in Saskatchewan have testified for both the Court and Defence. Approximately half (*n* = 4, 44.4%) of the Court-appointed experts in Saskatchewan were psychiatrists and approximately half (*n* = 2, 40.0%) of the Defence experts were psychiatrists. It was found that Manitoba employed five different Court-appointed experts utilized between one and six times and four different Defence experts utilized between one and two times. The minority (*n* = 1, 20%) of Court-appointed experts in Manitoba were from Manitoba and 50.0% (*n* = 2) of the Defence experts were from Manitoba. None of the experts in Manitoba have testified for both the Court and Defence. Approximately three-quarters (*n* = 4, 80.0%) of the Court-appointed experts in Manitoba were psychiatrists and one-quarter (*n* = 1, 75.0%) of the Defence experts were psychiatrists. Table 48 presents the experts involved by jurisdiction.

Table 48

Expert Involved by Jurisdiction

Province		**Court-Appointed**		**Defence**	
		n	%	*n*	%
British Columbia	Psychiatrist	7	46.7	6	42.9
	Psychologist	8	53.3	8	57.1
	Home Jurisdiction	15	100.0	12	85.7
Alberta	Psychiatrist	10	71.4	2	18.2
	Psychologist	4	28.6	9	81.8
	Home Jurisdiction	14	100.0	10	90.9
Saskatchewan	Psychiatrist	4	44.4	2	40.0
	Psychologist	5	55.6	3	60.0
	Home Jurisdiction	4	44.4	4	80.0
Manitoba	Psychiatrist	4	80.0	1	25.0
	Psychologist	1	20.0	3	75.0
	Home Jurisdiction	1	20.0	2	50.0

With respect to designation outcome (i.e., DO versus LTO), it was found that preventative detention hearings in British Columbia (n = 49) resulted in a DO designation 77.6% (n = 38) of the time and LTO designations 22.4% (n = 11) of the time. In Alberta (n = 23), it was found that preventative detention hearings resulted in DO designations 87.0% (n = 20) of the time and LTO designations 13.0% (n = 3) of the time. In Saskatchewan (n = 50), it was found that preventative detention hearings resulted in DO designations 82.0% (n = 41) of the time and LTO designations 18.0% (n = 9) of the time. And finally, in Manitoba (n = 18), it was found that preventative detention hearings resulted in DO designations 83.3% (n = 15) of the time and LTO designations 16.7% (n = 3) of the time. As noted in earlier analyses, designation outcome was not deemed the prime indicator due to the limitations within the legislation on judicial decision makers to use discretion. These jurisdictional analyses regarding designation outcome all appear similar with a DO designation being the most common outcome. Table 49 presents the results regarding designation outcome by jurisdiction.

Table 49

Designation Outcome by Jurisdiction

Province	Dangerous Offender		Long-Term Offender	
	n	%	*n*	%
British Columbia	38	77.6	11	22.4
Alberta	20	87.0	3	13.0
Saskatchewan	41	82.0	9	18.0
Manitoba	15	83.3	3	16.7

Note: N = 140.

With respect to penalty outcome (i.e., indeterminate versus determinate with an LTSO), it was found that preventative detention hearings in British Columbia (*n* = 49) resulted in indeterminate sentences 61.2% (*n* = 30) of the time and determinate sentences with LTSOs 38.8% (*n* = 19) of the time. In Alberta (*n* = 23), it was found that preventative detention hearings resulted in indeterminate sentences 78.3% (*n* = 18) of the time and determinate sentences with LTSOs 21.7% (*n* = 5) of the time. In Saskatchewan (*n* = 50), it was found that preventative detention hearings resulted in indeterminate sentences 52.0% (*n* = 26) of the time and determinate sentences with LTSOs 48.0% (*n* = 24) of the time. And finally, in Manitoba (*n* = 18), it was found that preventative detention hearings resulted in indeterminate sentences 77.8% (*n* = 14) of the time and determinate sentences with LTSOs 22.2% (*n* = 4) of the time. As noted in earlier analyses, penalty outcome was deemed to be a more appropriate indicator, particularly in regards to the 2008 legislation change, due to the discretion granted to judicial decision makers at this stage in the sentencing process.

These jurisdictional analyses regarding penalty outcome all appear similar except Saskatchewan wherein an individual facing a preventative detention hearing has a 50/50 chance of receiving an indeterminate sentence. This is a notable finding and a departure from the trend seen with respect to other provinces investigated. This result speaks to the impact of the 2008 legislation change, particularly in Saskatchewan, wherein judicial decision makers appear to be taking the opportunity to exercise their discretion in handing down determinate sentences with LTSOs as opposed to indeterminate sentences. Given the high proportion of Indigenous individuals brought forward for preventative detention applications in Saskatchewan, this trend towards determinate sentences with LTSOs should be regarded as the most favorable outcome. Table 50 presents the results regarding penalty outcome by jurisdiction.

Table 50

Penalty Outcome by Jurisdiction

Province	Indeterminate		Determinate with LTSO	
	n	%	*n*	%
British Columbia	30	61.2	19	38..8
Alberta	18	78.3	5	21.7
Saskatchewan	26	52.0	24	48.0
Manitoba	14	77.8	4	22.2

Note: N = 140. LTSO = Long-Term Supervision Order.

When considering the impact of the 2008 legislation change by jurisdiction; that is, exploring whether any of the four Canadian jurisdictions have altered their approach to sentencing DOs since the legislation change. A crosstabulation between year of index (pre- versus post-legislation change) and penalty outcome was conducted with respect to jurisdiction. It was found that there is no significant relationship between, and only a weak association with, year of index (pre- versus post-legislation change) and penalty outcome for British Columbia, χ^2 (1, 49) = .567, p = .452, Cramer's V = .108. Table 51 presents the results regarding penalty outcome for British Columbia pre- versus post-legislation change.

Table 51

Crosstabulation of Penalty Outcome by Jurisdiction (British Columbia) Pre- versus Post-Legislation Change

		Indeterminate		Determinate with LTSO	
		n	%	*n*	%
Year of index	Pre-legislation change	11	68.8	5	31.5
	Post-legislation change	19	57.6	14	42.4
Total		30	61.2	19	38.8

Note: χ^2 (1, 49) = .567[a], p = .452, Cramer's V = .108; κ = .091, p = .452. LTSO = Long-Term Supervision Order. Jurisdiction = British Columbia.

[a] 0 cells (.0%) have expected count less than 5. The minimum expected count is 6.20.

It was found that there is no significant relationship between, but a moderate association with, year of index (pre- versus post-legislation change) and penalty outcome for Alberta, χ^2 (1,

23) = 2.255, p = .133, Cramer's V = .313. Table 52 presents the results regarding penalty outcome for Alberta pre- versus post-legislation change.

Table 52

Crosstabulation of Penalty Outcome by Jurisdiction (Alberta) Pre- versus Post-Legislation Change

		Indeterminate		Determinate with LTSO	
		n	%	*n*	%
Year of index	Pre-legislation change	6	100.0	0	0.0
	Post-legislation change	12	70.6	5	29.4
Total		18	78.3	5	21.7

Note: χ^2 (1, 23) = 2.255[a], p = .133, Cramer's V = .313; κ = .179, p = .133. LTSO = Long-Term Supervision Order. Jurisdiction = Alberta.
[a] 3 cells (75.0%) have expected count less than 5. The minimum expected count is 1.30.

It was found that there is a significant relationship between, and a strong association with, year of index (pre- versus post-legislation change) and penalty outcome for Saskatchewan, χ^2 (1, 50) = 15.333, p < .001, Cramer's V = .554. Table 53 presents the results regarding penalty outcome for Saskatchewan pre- versus post-legislation change.

Table 53

Crosstabulation of Penalty Outcome by Jurisdiction (Saskatchewan) Pre- versus Post-Legislation Change

		Indeterminate		Determinate with LTSO	
		n	%	*n*	%
Year of index	Pre-legislation change	16	88.9	2	11.1
	Post-legislation change	10	31.3	22	68.8
Total		26	52.0	24	48.0

Note: χ^2 (1, 50) = 15.333[a], p < .001, Cramer's V = .554; κ = .525, p < .001. LTSO = Long-Term Supervision Order. Jurisdiction = Saskatchewan.
[a] 0 cells (.0%) have expected count less than 5. The minimum expected count is 8.64.

It was found that there is no significant relationship between, and a weak association with, year of index (pre- versus post-legislation change) and penalty outcome for Manitoba, χ^2

(1, 18) = 1.286, p = .257, Cramer's V = .267. Table 54 presents the results regarding penalty outcome for Manitoba pre- versus post-legislation change.

Table 54

Crosstabulation of Penalty Outcome by Jurisdiction (Manitoba) Pre- versus Post-Legislation Change

		Indeterminate		Determinate with LTSO	
		n	%	*n*	%
Year of index	Pre-legislation change	6	66.7	3	33.3
	Post-legislation change	8	88.9	1	11.1
Total		14	77.8	4	22.2

Note: χ^2 (1, 18) = 1.286[a], p = .257, Cramer's V = .267; κ = -.222, p = .257. LTSO = Long-Term Supervision Order. Jurisdiction = Manitoba.
[a] 2 cells (50.0%) have expected count less than 5. The minimum expected count is 2.00.

Overall, the results indicate that the 2008 legislation did not appear to influence British Columbia, Alberta, and Manitoba's ordering of indeterminate sentences versus determinate sentences with an LTSO during the period investigated. However, Saskatchewan appears to have adopted the 2008 legislation change to a substantial extent, as prior to the 2008 legislation change judicial decision makers were ordering indeterminate sentences 88.9% of the time, whereas after the 2008 legislation change judicial decision makers were ordering indeterminate sentences only 31.3% of the time. This adoption of the 2008 legislation change is likely what the federal government was hoping would occur, which is an opportunity for individuals who are "dangerous" under the law, to still have an opportunity to reside in a community setting with appropriate supports.

Whereas Saskatchewan appears to have adopted the 2008 legislation to a large extent, the trend appears to show British Columbia and Alberta also starting to adopt the 2008 legislation change but at a slower pace. However, Manitoba appears to be moving in the opposite direction in that the overall percentage of DOs provided indeterminate sentences has actually increased since the 2008 legislation change. That said, it is unclear the reasons for the increase as Manitoba clearly brings forward less preventative detention applications overall and it may be that their selectiveness of cases may already be those that warrant an indeterminate sentence to be levied. This line of reasoning could also apply to British Columbia and Alberta. However, knowing that,

as a jurisdiction, Saskatchewan brings forward more than three times as many preventative detention applications than any other province per 100,000 population, it may be that Saskatchewan prosecutors are not as selective about the cases they present for preventative detention hearings and judicial decision makers are recognizing this and making the appropriate adjustments during the penalty stage.

CHAPTER 4: DISCUSSION

In Canada, preventative detention legislation has been in place since the 1940s and although it has undergone several revisions over the last 70 years, the legislation has always allowed for an individual to be incarcerated for an indeterminate period of time based on the presumed high likelihood that they may commit crimes in the future (Lippke, 2008). Given the seriousness associated with a preventative detention application (i.e., the distinct possibility of being sentenced to incarceration for an indeterminate length of time), it is important to continually evaluate the validity and reliability of preventative detention legislation (in particular any changes to the legislation) to ensure the outcomes remain justified and are serving the intended purpose. This present research investigated publically available written DO sentencing decisions in four Canadian jurisdictions in order to examine what role expert risk assessments were having within preventative detention hearings and the judicial system's intepretation and use of them.

Hypotheses and research questions were derived for four primary areas: a) whether experts' ratings of risk, treatment amenability, and risk management in the community (as interpreted by judicial makers) influence the outcome of the hearing, b) whether partisanship continues to exist within preventative detention hearings and how the judicial system appears to be interpreting same, c) whether static, dynamic, or protective factors are being discussed (as intepretated by the judicial decision makers) and, if so, influencing the outcome, and d) whether the 2008 legislation change has had any effect on designation and penalty outcomes. Additional areas explored but no particular research questions posed included jurisdictional differences and the role of ethnicity, if any. The results are discussed below, in turn, in addition to some considerations regarding the clinical and correctional implications of this study, strengths and limitations, and future directions.

4.1 Expert Ratings and Outcome

The goal of the first hypothesis was to determinate whether the judicial decision makers' interpretation of the experts' ratings of risk, treatment amenability, and risk management in the community influence the two primary outcomes of preventative detention hearings. Preventative detention legislation requires one expert risk assessment to be completed which constitutes the Court-appointed expert. The Court-appointed expert is expected to provide a neutral unbiased assessment "to the Court, for the Court," and not for any particular side (i.e., Crown or Defence).

That said, there has been a series of legal challenges and subsequent case law generated (see, for example, *R.* v. *A.H.*, 2017) regarding how the expert is to be appointed and challenges to the fact that the Crown will typically put forward the name of an expert they feel will provide them with an assessment favorable to their position. Overall, the Courts appear to state that if an agreement cannot be reached between the Crown and Defence of an appropriate expert, the Court is to decide which to choose based on several factors (e.g., availability, expertise, cost, perceived conflict of interest, and so forth) after listening to arguments from both sides.

Previous research supports Court-appointed experts being more moderate compared to Crown retained experts (Blais, 2015), but that research did not investigate Defence retained experts. However, the basis of the Canadian legal system is an adversarial one and thus it is not uncommon, particularly for the Defence, to present evidence on their own behalf regardless of the expert selected to provide an assessment on behalf of the Court. It was also seen, from time to time in this study, that the Crown would also independently retain their own expert. Thus, two sets of analyses were conducted, one for each set of expert witnesses, the Court-appointed expert and the Defence expert.

As well, two primary outcomes were investigated. The first was the designation outcome wherein the judicial decision maker decides whether or not to assign a special sentencing designation (i.e., DO or LTO) based on the legislated criteria and treatability of "the threat posed" (*R.* v. *Boutilier*, 2017, p. 938). Here, the judicial decision maker has to be satisfied that the individual poses a "high likelihood of harmful recidivism and that his or her conduct is intractable," defining "intractable" as "behaviour that the offender is unable to surmount" (*R.* v. *Boutilier*, 2017, p. 938). In this respect, the SCC indicates that all evidence (including expert evidence) should be used (*R.* v. *Boutilier*, 2017, p. 938). Upon reading the DO decisions, it was not uncommon for judicial decision makers to include evidence throughout their decision-making process (i.e., at both the designation and penalty stages).

The second outcome is the penalty outcome wherein the judicial decision maker, based on the outcome of the designation stage, decides what sentence to impose on the individual (i.e., indeterminate sentence, determinate sentence with an LTSO, or determinate sentence only). The SCC has stated that all evidence (including expert evidence) should be used to help "determine the appropriate sentence to manage this threat" (*R.* v. *Boutilier*, 2017, p. 938). Not surprisingly, the judicial decision makers in this study did not impose any determinate only sentences and thus

the results were dichotomized to indeterminate versus determinate with an LTSO. It remains important to investigate both outcomes as many of the changes to the preventative detention legislation over the years have shifted the judicial decision makers' discretion to different areas.

Under the old legislation (which includes any index offence that occurred prior to the 2008 legislation change), judicial decision makers had more discretion at the designation stage and very little to no discretion at the penalty stage (e.g., if the individual met the DO criteria, they must be a DO and therefore automatically receive an indeterminate sentence). However, the 2008 legislation change shifted the judicial decision maker's discretion from the designation stage to the penalty stage. This has resulted in the penalty stage becoming the more critical outcome measure due to the increased discretion permitted at this stage.

4.1.1 Designation Outcome

Overall, designation outcome (i.e., DO or LTO) was found to be less influenced by the judicial decision makers' interpretation of the experts' ratings of risk, treatment amenability, and risk management in the community. Specifically, the judicial decision makers' interpretation of the Court-appointed experts' ratings of risk and treatment amenability did not significantly contribute to designation outcome. This is not surprising as most individuals facing preventative detention hearings are already considered high-risk due to their criminal histories, personalities, and their substance use issues, and thus an expert's evaluation of this is not necessarily seen as something not already known. That said, there are many high-risk individuals whom never face preventative detention hearings as it has been found that DOs are generally no higher risk than their incarcerated counterparts (Bonta et al., 1998; Koopman, 1985; Langevin & Curnoe, 2014; Nicholaichuk et al., 2013; Thompson, 2016; Trevethan et al., 2002). This brings into question why some individuals are selected to face preventative detention hearings and others with similar presentations and backgrounds are not?

Moreover, although the SCC has stated that the decision of whether or not to assign a special sentencing designation should be about treatability, the data due not support this approach. The data show that treatment amenability is influencing penalty outcomes but not designation outcomes. One reason for this may be the lack of another suitable designation if the legislated criteria are met; that is, in the past, judicial decision makers could utilize treatability as a reason for designating someone an LTO if they felt the individual did not meet the criteria in full. However, the 2008 legislation change has made it clear that judicial decision makers no

longer have that discretion if the criteria are met and thus, they have shifted the treatability evidence to justify the penalty outcome.

That said, one area that the judicial decision makers' interpretation of the Court-appointed experts' influence was seen with respect to designation outcome was their assessment of risk management in the community. If the judicial decision makers' interpretation of the Court-appointed experts testimony supported the individual's risk management in the community than the individual was less likely to be assigned a DO designation. This also falls in line with the designation criteria as the primary difference between an LTO and DO is manageability in the community. Thus, it is not surprising that the risk management in the community portion of the Court-appointed risk assessment is considered in the designation stage.

The data show that when the judicial decision makers interpreted the Court-appointed experts' ratings of an individual's risk as "very high," 93% of the time that individual was designated a DO rather than an LTO. When the judicial decision makers interpreted the Court-appointed experts' ratings of an individual's risk as "moderate or lower," only 67% of the time that individual was designated a DO. The data also show that when the judicial decision makers interpreted the Court-appointed experts' ratings of an individual's treatment amenability as "high," 67% of the time they received a DO designation compared to 86% of the time when the individual's treatment amenability was rated as "low."

Moreover, the data show that when the judicial decision makers interpreted the Court-appointed experts' ratings of an individual's risk management in the community as manageable, 73% of the time the individual received a DO designation compared to receiving a DO designation 91% of the time when the individual's risk management in the community was rated as not manageable. In terms of risk management in the community, it is noted that there tended to be considerable evidence presented in the preventative detention hearings from other "experts" regarding program options and community supports that may have also influenced judicial decision makers' decisions in this particular regard. Generally, the trend seen with respect to the judicial decision makers' interpretation of the Court-appointed experts' ratings were, lower ratings of risk, higher ratings of treatment amenability, and a higher rating of manageability of risk in the community resulted in a lower likelihood of the individual receiving a DO designation.

Whereas the most influential area for Court-appointed experts (as interpreted by judicial decision makers) with respect to designation outcome was their rating of risk management in the community, the Defence experts' rating of risk management in the community (as interpreted by judicial decision makers) was not influential with respect to designation outcome. When the Defence expert rates an individual's risk management in the community as manageable (as interpreted by judicial decision makers), 86% of individuals received a DO designation compared to 83% when the Defence experts rated the individual's risk management in the community as not manageable. Interestingly, and in contrast with the Court-appointed experts' ratings of risk management in the community, judicial decision makers appear influenced by the Defence experts' assessment of treatment amenability (and less so with risk judgment) with respect to designation outcome. If the judicial decision makers interpreted the Defence experts' ratings of an individual's risk as very high or high than 92% of the time the individual was designated a DO, whereas if the Defence experts rated an individual's risk as "moderate or lower," 72% of the time the individual was designated a DO.

Moreover, if the judicial decision makers' interpretation of the Defence experts' ratings of an individual's treatment amenability as "low" than the individual was designated a DO 100% of the time, whereas if the Defence experts rated an individual's treatment amenability as "not low" than the individual was designated a DO 79% of the time. These results make sense and likely speak to the idea that if the Defence expert, who is by nature meant to be the most favorable towards the individual facing preventative detention, agrees that treatment amenability is low and risk is high (or very high), then judicial decision makers are seeing no reason to support anything except the most extreme designation. Generally, the same trends were seen with respect to the judicial decision makers' interpretation of the Defence experts as with the Court-appointed experts wherein lower ratings of risk, higher ratings of treatment amenability, and higher ratings of manageability of risk in the community resulted in a lower likelihood of the individual receiving a DO designation.

4.1.2 Penalty Outcome

Overall, results from both experts' ratings of risk, treatment amenability, and risk management in the community (as interpreted by judicial decision makers) were consistent with previous research (Blais, 2015; Lloyd et al., 2010). Specifically, it was found that the judicial decision makers' interpretation of the Court-appointed experts' ratings of risk, treatment

amenability, and risk management in the community were found to be influential on penalty outcomes (i.e., indeterminate versus determinate with an LTSO). This is not surprising given that preventative detention legislation provides judicial decision makers with the most discretion at the penalty stage and thus the experts' opinions (as interpreted by the judicial decision makers) can be more fully integrated into the decision-making process.

That said, there are less criteria or clear guidelines in respect the penalty stage of the preventative detention process and thus more subjectivity applied. The SCC has indicated that "…only offenders who pose a tremendous future risk are designated as dangerous and face the possibility of being sentenced to an indeterminate detention" (*R.* v. *Boutilier*, 2017, p. 938). The primary criterion speaks to risk management in the community and thus the related concept of treatment amenability (e.g., level of motivation and cognitive capacity). This is a different judgment for judicial decision makers and experts alike to make. One cannot predict the future with absolute certainty and thus these two areas, treatment amenability and risk management in the community, tend to result in less confident appraisals. The result is more severe sanctions as judicial decision makers and experts alike err on the side of caution and public safety but that is also likely resulting in more individuals being incarcerated indefinitely.

The data showed that when the judicial decision makers interpreted the Court-appointed experts' ratings of an individual's risk as "very high," that individual received an indeterminate sentence 79% of the time. When the judicial decision makers interpreted the Court-appointed experts' ratings of an individual's risk as "moderate or lower," that individual received an indeterminate sentence only 33% of the time. Generally, the higher the risk rating by the Court-appointed experts (as interpreted by judicial decision makers), the higher the likelihood the individual received an indeterminate sentence and the lower the risk rating, the higher the likelihood the individual received a determinate sentence with an LTSO.

When the judicial decision makers interpreted the Court-appointed experts' ratings of an individual higher in treatment amenability (i.e., more treatment amenable), there was a lower likelihood the individual would receive an indeterminate sentence. Moreover, when the judicial decision makers interpreted the Court-appointed experts' rating of an individual lower in treatment amenability (i.e., less treatment amenable), the more likely the individual would receive an indeterminate sentence. The data showed that when the judicial decision makers interpreted the Court-appointed experts' ratings of an individual's treatment amenability as

"high," the individual received an indeterminate sentence only 17% of the time compared to 82% of the time when the individual's treatment amenability was rated as "low."

When the judicial decision makers interpreted the Court-appointed experts' rating of an individual as manageable in the community, the individual was more likely to receive a determinate sentence with an LTSO than when the Court-appointed experts rated the individual's risk as not manageable in the community. When the judicial decision makers interpreted the Court-appointed experts' rating of an individual's risk as manageable in the community, the individual was given an indeterminate sentence 39% of the time whereas when the Court-appointed expert rated the individual as not manageable in the community, the individual received an indeterminate sentence 89% of the time. Generally, the trend for the Court-appointed expert showed that lower risk ratings, higher ratings of treatment amenability, and higher risk manageability in the community (as interpreted by judicial decision makers) resulted in a much lower likelihood that the individual would receive an indeterminate sentence.

When looking at what Court-appointed experts' ratings are most predictive of penalty outcome (as interpreted by judicial decision makers), the Court-appointed experts' ratings of risk management in the community and treatment amenability were the most predictive factors, followed by the Court-appointed experts' rating of risk. If the judicial decision maker interpreted the Court-appointed experts' ratings of an individual's treatment amenability as moderate or higher there was a 74% decrease in odds that the individual would be given an indeterminate sentence. Moreover, if the judicial decision maker interpreted the Court-appointed experts' ratings of an individual's risk management in the community as manageable, there was an 84% decrease in the odds that the individual would be given an indeterminate sentence. Overall, the Court-appointed experts' rating of risk management in the community and treatment amenability (as interpreted by judicial decision makers) were uniquely predictive over and above their ratings of risk judgment. This result supports prior research wherein treatment amenability and risk management in the community were the primary predictors of outcome (Blais, 2015; Lloyd et al., 2010).

When considering the Defence experts' ratings of risk (as interpreted by judicial decision makers), the higher the rating of risk, the more likely the individual received an indeterminate sentence compared to a determinate sentence with an LTSO. The data show that when the judicial decision makers interpreted the Defence experts' rating of an individual's risk as "very

high or high," 78% of the time the individual received an indeterminate sentence compared to 39% of the time when the Defence experts rate an individual's risk as "moderate or lower." As seen with the designation outcome, the general trend is that the higher the Defence experts' ratings of treatment amenability (as interpreted by judicial decision makers), the less likely the individual would receive an indeterminate sentence. The data show that when the judicial decision makers interpreted the Defence experts' rating of an individual's treatment amenability as "not low," 50% of the time the individual will receive an indeterminate sentence compared to 100% of the time when the individual's treatment amenability is rated as "low." This result speaks to the importance of the Defence experts' opinion (as interpreted by judicial decision makers) in the sense that if they also feel the individual is low in treatment amenability then the likelihood of the individual's success in terms of change is not hopeful and the judicial decision maker is almost surely going to sentence the individual to an indeterminate term.

The general trend that appeared was higher ratings of risk management in the community by the Defence experts (as interpreted by judicial decision makers) were associated with a higher likelihood that the individual would receive a determinate sentence with an LTSO. However, lower ratings of risk management in the community by the Defence experts were associated with a higher likelihood the individual would receive an indeterminate sentence. The data show that when the judicial decision makers interpreted the Defence experts' ratings of an individual's risk as manageable in the community, 61% of the time the individual received an indeterminate sentence compared to 83% of the time when the individual's risk was rated as not manageable in the community. Overall, the data show that the Defence experts' risk judgment and risk management in the community variables (as interpreted by judicial decision makers) may have less influence with respect to penalty outcome but the Defence experts' treatment amenability variable is significant with respect to penalty outcome.

When looking at what Defence experts' ratings (as interpreted by judicial decision makers) are predictive of penalty outcome, all three ratings contributed to penalty outcome; however, the Defence experts' ratings of treatment amenability was the only predictive factor. Overall, the higher the rating of treatment amenability (as interpreted by judicial decision makers) the less likely an individual will receive an indeterminate sentence. If the judicial decision makers interpreted the Defence experts' ratings of the individual as treatment amenable the individual has an 89% decrease in odds of being sentenced to an indeterminate period.

However, if an individual's risk is considered manageable in the community, there is only a 46% decrease in odds that they will be given an indeterminate sentence. The other two Defence expert rated variables (as interpreted by judicial decision makers), risk judgment and risk management in the community, were not predictive of penalty outcome over and above the Defence experts' rating of treatment amenability.

In conclusion, it appears from these results that experts' ratings of risk, treatment amenability, and risk management in the community are being taken into consideration by judicial decision makers. However, it is also noted that many times there are multiple experts from various agencies that testify at preventative detention hearings and thus it is unclear what influence their testimony is contributing to the outcome. Judicial decision makers are required to integrate all the information before them into a final judgment. Moreover, it is not uncommon for judicial decision makers to be engaged in confirmation bias and be selective about what facts they wish to focus on and include (particularly from expert assessment reports) in order to support their own conclusion (Blais, 2015). However, as it is unlikely that human bias will be eliminated at this stage, all experts can do is present the information as cohesively and clearly as possible both in their written and oral testimony.

4.2 Presence of Partisanship

Prior changes to preventative detention legislation attempted to reduce the amount of partisanship between experts by requiring the testimony of only one psychiatrist at the hearing. The 2008 legislation change continued to impose a requirement for one Court-appointed expert risk assessment to be completed with the likely hope that partisanship would continue to be reduced. However, one fundamental aspect of the Canadian legal system is that it is adversarial and you have a fundamental right to defend yourself by presenting evidence on your own behalf. Given that the Court-appointed experts appear, at times, to be associated with the Crown rather than the Court (as seen by individuals refusing to be interviewed by the Court-appointed experts but agreeable to be interviewed by their own expert), it is clear that partisanship is unlikely to be eliminated in preventative detention hearings. Prior research noted that approximately half of the hearings evaluated had adversarial risk assessments and the evidence showed that partisanship still existed (Blais, 2015). It was not believed that this research set would fundamentally be different in this regard; however, Blais (2015) compared specific instrument scores between Court-appointed and Crown retained experts versus general ratings of risk, treatment

amenability, and risk management in the community and this research investigated not only the overall ratings in each of the three assessment areas: risk judgment, treatment amenability, and risk management in the community, but also a comparison of Court-appointed experts with Defence retained experts.

The results of this study found that 55 of the 140 cases (39%) contained a Defence expert hired specifically to provide an opinion on the Defendant's behalf, which once again introduces the possibility of partisanship and supports prior research (Blais, 2015). Moreover, there were at least 14 additional cases (10%) wherein a Crown expert was hired specifically to provide an opinion on the Defendant which were not specifically evaluated in this study. It is not clear why the Crown, at times, decides to hire their own expert but it would be possible it is to either reinforce their case or because they are unhappy with the assessment of the Court-appointed expert. As noted, it is not uncommon for the Crown to "pick and choose" an expert (from anywhere within Canada) that will be agreeable to their position and present it to the Court as an option. However, it is also not uncommon for judicial decision makers (case law aside) to allow the Crown to choose the Court-appointed expert. Whatever the reasons, it again brings into question the presence of partisanship. In this study, it was also not uncommon to have more than two experts either provide assessments or testimony at the preventative detention hearings. For the purposes of this study, the Court-appointed expert was included as the first expert and the second expert was the Defence expert.

When considering the role of the experts by jurisdiction, this study found that 100% of the Court-appointed experts in British Columbia and Alberta are from within their own province and 85.7% (BC) and 90.9% (AB) of the Defence experts are from within their own province. However, only 44.4% of Court-appointed experts in Saskatchewan are from Saskatchewan and only 20% of Court-appointed experts in Manitoba are from Manitoba, with 80% (SK) and 50% (MB) of the Defence experts from within their own province. It is not directly known why Saskatchewan and Manitoba have much lower rates of utilizing Court-appointed experts within their own provinces (as it is not likely due to a lack of expertise or availability); however, it is postulated that the Crown are seeking the most favorable assessment to support their case and thus search outside the province, as necessary to receive that assessment. This is supported by the fact that in Saskatchewan one Court-appointed expert has testified 19 times (38%) and another has testified 16 times (32%); thus 70% of the Court-appointed expert testimony is

coming from two experts who are not from Saskatchewan. Similar results can be seen in Manitoba wherein two Court-appointed experts have testified 6 times each for a total of 66.6% of the testimony coming from experts not from Manitoba. In contrast, British Columbia and Alberta do not utilize any out of province Court-appointed experts and the most any one expert has testified in each province is eight times (16.3%) in British Columbia and six times (26.1%) in Alberta, showing more diversity in their expert selection criteria.

Further, when considering type of expert (Court-appointed versus Defence retained) by credential (psychiatrist versus psychologist) by jurisdiction, interesting results were found. The Court-appointed and Defence experts in British Columbia and Saskatchewan were almost equally split between psychologists and psychiatrists. However, the Court-appointed experts in Alberta (71.4%) and Manitoba (80%) were primarily psychiatrists and Defence experts in Alberta (81.8%) and Manitoba (75%) were psychologists. Again, it is not known why these jurisdictional differences in terms of expert credential exists, but it is postulated that it could have to do with an experts' willingness to testify, availability, perceived benefit of one qualification over another, and the desire of the either side to receive a favorable report. This again speaks to the issue of partisanship and bias within the judicial system within Canada.

Overall, the results suggest that in cases where there is both a Court-appointed expert and Defence expert, judicial decision makers' report a significant amount of agreement on all three assessment areas (as interpreted by judicial decision makers). Again, it is important to note that the written decisions are the judicial decision makers' words and not always the experts' words. Further analyses on whether the experts' ratings in each assessment area was influential on penalty outcome, it was found that neither expert's ratings (as interpreted by the judicial decision makers) with respect to risk judgment uniquely predicted penalty outcome. However, the Court-appointed expert did appear to have more of an influence over the Defence expert (as interpreted by judicial decision makers).

In terms of percent agreement, the data show that when the judicial decision makers interpret the Court-appointed experts' ratings of an individual's risk as "very high or high," the Defence expert is in agreement 80% of the time. When the judicial decision makers interpret the Court-appointed experts' ratings of an individual's risk as "moderate or lower," the Defence expert was in agreement 90% of the time. Overall, this speaks to a high level of agreement between the Court-appointed and Defence experts on the risk judgment variable (as interpreted

by the judicial decision maker). As noted, this is not surprising as most individuals being presented for preventative detention are already believed to be a higher risk to recidivate based on several factors (e.g., criminal history, personality presentation, substance use issues, past breaches). However, if they are not deemed to be a higher risk based on their history, it is likely that they are facing preventative detention on one of the criteria that is less common (e.g., sexual offence and particularly 'brutal'). Moreover, many of the same actuarial instruments are utilized which, if completed according to administration and scoring criteria, should broadly result in the same level of risk judgment, bearing in mind that: 1) a risk judgment is more than the result of a single tool, 2) evaluators may use different tools, 3) evaluators may show poor inter-rater reliability, even when they rate the same tools, and 4) evaluators may draw different conclusions even from the same trends in the assessment data.

In terms of treatment amenability, the data show that when the judicial decision makers interpreted the Court-appointed experts' ratings of an individual's treatment amenability as "not low," the Defence experts were in agreement 100% of the time. When the judicial decision makers interpreted the Court-appointed experts' ratings of an individual's treatment amenability as "low," the Defence experts were in agreement 52% of the time. This result appears to speak to some partisanship with respect to treatment amenability in that it appears the Defence expert tends to more consistently feel there is an overall higher level of treatment amenability than Court-appointed experts. However, when a case appears clear and possibly unique in the treatment amenability factors presented (e.g., clear factors that speak to high treatment amenability), the experts appear in agreement 100% of the time. Moreover, treatment amenability is more subjective than some other factors and there are no specific risk assessment instruments that address it, thus there is a higher likelihood of discordance to arise without partisanship being implicated. That said, it would be beneficial to have a measure developed that specifically addresses treatment amenability so that clinicians and others can make more objective, clear, confident, and comprehensive evaluations. This may reduce the partisanship and bias by experts and judicial decision makers alike.

Further, if the Court-appointed expert is in fact primarily selected by the Crown (and agreed to by the Court), and they seek out favorable experts to provide an opinion, then the partisanship or bias is actually presented by the Court-appointed expert, not the Defence expert. That said, the judicial decision makers appear to favor, at times, the Court-appointed expert

which does not bode well for the Defendant. Overall, in terms of treatment amenability, it was found that each experts' ratings contributed unique information and the Court-appointed experts' ratings (as interpreted by the judicial decision maker) were incrementally predictive of penalty outcome. Moreover, even though the Defence experts' ratings (as interpreted by the judicial decision maker) were not incrementally predictive, it was shown that their opinion does carry some weight.

In terms of risk management in the community, the data show that when the judicial decision makers interpreted the Court-appointed experts' ratings of an individual's risk as manageable in the community, the Defence expert is in agreement 97% of the time. When the judicial decision makers interpreted the Court-appointed experts' ratings of an individual's risk as not manageable in the community, the Defence expert was in agreement 42% of the time. Similar to the results with treatment amenability, this result also appears to speak to some partisanship with respect to risk management in the community in that it appears the Defence experts tend to feel the individual is likely to be managed in the community more than Court-appointed experts (as interpreted by judicial decision makers). Further, risk management in the community, as with treatment amenability, is more subjective and not directly measured by risk assessment instruments, and thus there is a higher likelihood of discordance to arise. Moreover, as with the results of treatment amenability, it could be seen that the Court-appointed experts (who are hand selected by the Crown) are the experts showing partisanship and bias in this regard, or at the very least a more conservative approach.

When considering which experts' ratings of risk, treatment amenability, and risk management in the community, if any (as interpreted by judicial decision makers), was predictive of penalty outcome, it was found that both the Court-appointed and Defence experts' rating of treatment amenability are generally predictive of penalty outcome. However, the data only support that the Court-appointed experts' ratings of treatment amenability (as interpreted by judicial decision makers) uniquely predicted penalty outcome. The data with respect to the Defence experts' ratings of treatment amenability (as interpreted by judicial decision makers) are approaching significance and are likely affected by sample size.

It was found that the judicial decision makers interpretation of the Court-appointed experts' ratings of treatment amenability are predictive of the penalty outcome 85% of the time, whereas the Defence experts' ratings of treatment amenability are predictive of the penalty

outcome 80% of the time. Generally, the data support that both experts' ratings of treatment amenability (as interpreted by judicial decision makers) contribute uniquely to the prediction of penalty outcome; however, it appears as though the Court-appointed experts' ratings of treatment amenability (as interpreted by judicial decision makers) is incrementally predictive of penalty outcome whereas the Defence experts' ratings is not incrementally predictive of penalty outcome. Overall, it appears that the judicial decision makers are giving the Court-appointed experts more weight than the Defence experts, but the Defence experts do still get some weight. This again could be due to the perception of partisanship on behalf of the judicial decision maker and believing the Court-appointed experts are likely providing a less biased opinion when in fact they could be providing the more biased opinion, or at least a more conservative opinion that is generally in favor of the Crown who selected them. This could also be the result of confirmation bias by the judicial decision maker.

In terms of both the Court-appointed and Defence experts' rating of risk judgment (as interpreted by judicial decision makers), it was found that they are both generally predictive of penalty outcome. However, the data do not support that either expert uniquely predicts penalty outcome. The trend that appears seems to provide support that the Court-appointed experts have slightly more influence than the Defence experts (as interpreted by judicial decision makers). This result is not surprising given the fact that risk judgment is not significantly related to penalty outcome and the fact that the two experts tend to have a high degree of concordance when assessing risk (as interpreted by judicial decision makers). Moreover, risk judgments are less subjective and thus there is a lower likelihood of discordance to arise. Risk judgment is also largely driven by valid and reliable risk assessment instruments which eliminates a considerable amount of variance in the overall ratings.

Further, in terms of ratings of risk management in the community, it was found that only the Court-appointed experts' rating of risk management in the community (as interpreted by judicial decision makers) was uniquely predictive of penalty outcome. When risk was assessed as manageable in the community by the Court-appointed experts (as interpreted by judicial decision makers), this was associated with a 93% decrease in the odds of an indeterminate sentence in contrast to 1.4% for the Defence experts' rating of risk management in the community. That is, the data support that the Court-appointed experts' conclusions on risk management in the

community would appear to overrule the Defence experts' conclusion (as interpreted by judicial decision makers).

This is likely the most prominent example of a judicial decision maker accepting the evidence of the Court-appointed experts compared to the evidence of the Defence experts. The reason for this almost complete acceptance is not clear but could be due to the judicial decision makers' beliefs that partisanship exists on behalf of the Defence experts instead of the Court-appointed experts (which is more likely) and thus the Defence experts' evidence simply cannot be believed. However, it could also be a form of confirmation bias on behalf of the judicial decision maker wherein they are selecting what supports their personal opinion and ultimately the more conservative assessment. This could also be the case because there is fear around making the "wrong" decision and having someone in the future get hurt as a result. Overall, judicial decision makers do not appear to be considering the Defence experts' views on risk management in the community and are instead choosing to prefer the testimony of the Court-appointed experts.

Interestingly, as noted, there is a significant overlap in experts that have testified on behalf of both the Court and the Defence at various points in time. For example, Dr. X testifies often for the Court but has also, from time to time, testified for the Defence in certain cases. If Dr. X is truly biased, this perceived adversarial flip flop would be highly unlikely to occur. That said, it is not common to see Dr. X testify more than once for one side but multiple times for the other side. For example, Dr. X mostly testifies for the Defence but has on one occasion testified as the Court-appointed expert. It could be postulated that if an expert is not used multiple times by one particular side, it may be because they did not provide a favorable position to that particular side. Saskatchewan is a prime example of this in that they focus their appointments of experts to only one or two experts due to favorable outcomes and it is less likely the Defence will hire these same experts. Moreover, although the Crown and the Defence are, by law, meant to agree on the appointment of the Court-appointed expert, along with the judicial decision maker, it is not uncommon for the Crown to get their expert appointed even if the Defence does not agree. For this reason alone, if partisanship exists, it is likely to exist with the Court-appointed expert. That said, similar to many fields of study and practice, it is not uncommon to have varying opinions and that is acceptable as long as each side can justify their position and support it with research.

In conclusion, although the 2008 legislation change was, in part, meant to continue to eliminate the partisanship that existed within preventative detention hearings, the results show that partisanship continues to exist in some areas more than others. The less subjective areas tend to have higher levels of agreement and the more subjective areas tend to have lower levels of agreement (as interpreted by judicial decision makers). Interestingly, although the legislation continues to attempt to eliminate partisanship on behalf of the experts, it has not yet addressed potential biases that exist with both the selection of the Court-appointed expert or judicial decision makers themselves. Moreover, much of the discordance within the areas of treatment amenability and risk management in the community could be reduced by the introduction of clear, specific operational definitions and assessment tools. However, given the way our judicial system is structured, it is highly unlikely that partisanship will ever be eliminated.

4.3 Presence of Static, Dynamic, and Protective Factors

Research supports dynamic and protective factors as being influential in assessing an individual's risk level, as well as treatment amenability and risk management in the community (Bonta & Andrews, 2017). However, it has also been found that less than half of all assessments in preventative detention hearings (from 2006 to 2008) contained information on dynamic or protective factors (Blais & Forth, 2014). As noted previously, it is important to remember that the data collected was what was contained in the written judicial sentencing decision and at the discretion of the individual judicial decision maker and not necessarily what was contained in the experts' reports. However, the previous research by Blais and Forth (2014) did review the actual risk assessment reports and still noted a low rate of discussion around dynamic and protective factors by the experts.

Overall, there was only one significant finding with respect to a discussion of static, dynamic, or protective factors for either the Court-appointed or Defence experts (as interpreted by judicial decision makers). It was found that the Defence experts' discussion of static versus dynamic factors showed that 56% of the time the Defence experts noted the difference between static and dynamic factors (as interpreted by judicial decision makers), the individual was given an indeterminate sentence; however, when the Defence did not note the difference between static and dynamic factors, the individual received an indeterminate sentence 88% of the time. The reason why the Defence experts' discussion around static and dynamic factors is significant is unknown but review of the decisions indicate that there would be a substantial amount of focus

on the differentiation of age as a dynamic factor and the concept of "burnout" with respect to recidivism and adverse personality factors. It appears that Defence experts tend to focus on these types of dynamic factors more than Court-appointed experts.

Otherwise, there were no significant findings with respect to a discussion of static, dynamic, or protective factors for either the Court-appointed experts or Defence experts (as interpreted by judicial decision makers). Perhaps these areas are less well understood by judicial decisions makers and thus not focused on in their decision-making process. Or perhaps these factors are taken for granted by experts and they are not being well explained in the expert risk assessment reports further hindering judicial decision makers' use of them. Moreover, perhaps experts themselves are not well-informed in some of the factors and thus fail to include or speak about them in their testimony. For example, protective factors and their role in risk assessment and recidivism are only really starting to be explored and thus perhaps experts are not yet comfortable with speaking to them in an expert capacity. As well, it is difficult to ascertain whether experts and judicial decision makers are operating under the same definitions and understanding of static, dynamic, and protective factors. For example, as in previous research, it appears that the construct of psychopathy and the use of the PCL-R are still misunderstood and misused (e.g., psychopathy (or severe antisocial personality disorder) is not treatable).

Further, it was noted in the decision documents that personality factors (e.g., antisocial personality disorder or psychopathy), as well as substance use issues, were major discussion points in the vast majority of cases. However, there was little, if any, discussion around successful treatment of these factors. For example, some researchers have found that, despite the negative findings regarding psychopathy and treatment amenability, poor methodology may be confounding results (D'Silva et al., 2004). Moreover, although individuals high in psychopathy may be more likely to be unmotivated, resistant to treatment, and have high attrition rates (Wong et al., 2007), positive treatment outcomes have been found when evidence-informed risk-need-responsivity based approaches are employed to retain these individuals in treatment (e.g., Olver & Wong, 2009).

Instead, much of the discussion typically centered around failures in the past regarding treatment and thus little hope for future treatment. Moreover, as many individuals facing preventative detention applications are older at sentencing it is not uncommon for a discussion around age and burnout to take place. This is another area that appears not well understood and

yet is supported by research. Alternatively, it is not uncommon for an expert or a judicial decision maker to use the reasoning against the individual in that they will say that they are already of an older age and yet not slowing down in their criminal behavior. However, when evaluated more closely, it is likely that the individual has reduced not only the frequency but severity of their offences, but the difference between past frequency/severity and present frequency/severity could be being perceived differently. Some experts and judicial decision makers may not see a reduction in the same way.

Whatever the reasons, judicial decision makers are not necessarily being made aware of important dynamic and protective factors that can assist in ameliorating hearing outcomes. Overall, it continues to appear that experts, along with judicial decision makers, continue to focus on static factors and past behavior in predicting the likelihood of future behavior when other factors could be helpful in the final determination. It is noted that protective factors were not commonly noted in the sentencing decisions and, when they were noted, they were deemed to be insufficient to override other risk information. The focus within risk assessments appears to continue to be on risk factors and not dynamic or protective factors.

4.4 Effect of 2008 Legislation Change

The effect of the 2008 legislation change has not yet been evaluated and thus much of the analyses were exploratory. That said, it was hypothesized that the majority of DOs will receive indeterminate sentences rather than determinate sentences with LTSOs. Both the designation outcome and penalty outcome were analyzed to determinate what effect, if any, the 2008 legislation change has had on the DO population. The 2008 legislation change with respect to preventative detention applications appear to contribute little in terms of the overall number of individuals designated as DOs. It was unclear how the 2008 legislation change would change designation outcomes and judicial decision makers appeared to believe that there would be an increase number of DO designations because of the 2008 legislation change as they would no longer be able to as easily select a different designation (e.g., LTO) (as noted by their written words). However, in this study, there appears to be an equal number of DO designations pre-legislation (81.8%) and post-legislation (81.3%) change. As well, as noted, due to the 2008 legislation change reducing the judicial decision maker's discretion at the designation stage and the fact that the criteria for a DO designation did not change, it is not surprising that there are no effects of the legislation with regards to this aspect.

However, as judicial decision makers are provided considerable discretion at the penalty stage of the hearing, it was unknown whether the 2008 legislation change would influence this aspect of the outcome. The results indicate that the 2008 legislation change did significantly impact penalty outcomes (i.e., indeterminate versus determinate with an LTSO). Specifically, prior to the 2008 legislation change 80% of DOs were given indeterminate sentences (as per legislative requirements at the time); however, after the 2008 legislation change, only 54% of DOs were given indeterminate sentences. The findings in this study appear to show that the legislation change did, in part, change the characteristics of the DO population. The DO population now essentially includes a subset of individual that are more similar to LTOs than indeterminate DOs with respect to their risk manageability in the community. This is due directly to the shift in the discretion of judicial decision makers at the designation stage. It is highly likely that many of the determinate sentences with LTSOs post-2008 legislation change would have been found to be LTOs pre-2008 legislation change.

It will be interesting to see how the judicial system, Correctional Service Canada, Parole Board of Canada, expert witnesses, and others interpret this subset of individuals. Specifically, the term "DO" or "Dangerous Offender" has become synonymous with not only an indeterminate sentence but also representing individuals who are the highest level of risk, lowest level of treatment amenability, and lowest likelihood of successful reintegration into the community. With this label comes a significant amount of stigmatism and judgment. It remains to be seen if this new subset (i.e., DOs with determinate sentences and LTSOs) will be treated any differently in the eyes of those they have to come into contact with. That said, there are now likely to be fewer LTOs having been replaced by DOs with determinate sentences and LTSOs. The concern here is that the designation of a DO is stigmatizing whether or not it is accompanied by an indeterminate sentence. The designation alone will very likely result in increased bias and supervision conditions that could lead to issues with compliance based on potential unreasonableness. This could result in a very high chance of failure and thus ultimately an indeterminate sentence in the end, thus confirming the Crown's reasons for bringing a preventative detention hearing in the first place. Ultimately, it is highly likely judicial decision makers are correct in that there will be more DOs with indeterminate sentences.

In terms of the preventative detention legislation itself, it is believed that it is not necessary to manage high risk, high need individuals within community or the criminal justice

system. It would be more appropriate to levy appropriate sentences to these individuals based on their index offence combined with their history. In many cases, lengthy sentences (e.g., 10 plus years) would be warranted and would serve multiple functions. First, a sentence with an end-point would serve to promote hope and motivation in the individual being sentenced by giving them an end point to look forward to which may increase their positive behavior. Second, a lengthy but determinate sentence would allow for a more realistic rehabilitation and reintegration by providing a statutory release date and community support while on parole and beyond. And third, a lengthy determinate sentence would provide sufficient opportunity for aging individuals, in particular, to spend the balance of their lives in the community by being repatriated and thus increase their likelihood of finding appropriate community supports (e.g., long-term care, group home). Indeterminate sentences only serve to cost taxpayers significant amounts of money when it comes to housing DOs and reducing an individual's motivation to change and succeed. That said, if the money spent to prosecute and house DOs was put back into the community by way of supports, housing, and programming, it is highly likely DOs risk would be able to successfully be managed in the community.

As well, the legislation with regard to preventative detention is currently vague and contains multiple subjective terms that are difficult for clinicians to quantify (unlike a risk rating). If the assistance of clinicians continues to be requested and required by law, it will be necessary to develop more clear operational definitions of terms, such as "dangerousness," "brutal," "treatment amenability," "risk management in the community," and "pattern." Further, perhaps clinicians could work towards developing actuarial instruments that may assist in making more clear conclusions regarding concepts such as treatment amenability in order to assist not only judicial decision makers but other professionals who work within the criminal justice system (e.g., CSC, PBC). These fundamental issues regarding preventative detention legislation and how to manage these high risk, high need individuals are not unique to Canada and can be seen to varying degrees on a global scale (e.g., United Kingdom, Germany, Australia, United States, Denmark, New Zealand).

4.5 Ethnicity

Given that, as at the fiscal year end 2018-2019, 35.5% of DOs are of Indigenous descent (Public Safety Canada, 2020), analyses were completed on each variable to determine if racial ancestry was associated with DO sentencing decisions (Lloyd et al., 2010). Previous results

investigating DO sentencing decisions found no relationship between ethnicity and outcome (Blais, 2015; Lloyd et al., 2010). Moreover, it was noted that a large proportion of sentencing decisions failed to note any ethnicity. Although it is not uncommon for the judicial decision maker to not note ethnicity, it can be widely assumed that if they do not mention ethnicity then it is very likely that the individual was Caucasian. This assumption is made in this study as judicial decision makers frequently noted ethnicity when it was a potential factor in the individual's life. For example, the law requires Indigenous social history to be considered when sentencing Indigenous individuals (as per *R.* v. *Gladue*, 1999). Therefore, judicial decision makers are required to mention ethnicity during these hearings. Moreover, it was found that when someone was, for example, not born in Canada and had early life experiences that were adverse, ethnicity was also noted.

This current research explored ethnicity regarding multiple outcomes as previous research generally supported that ethnicity did not play a role in outcomes (Blais, 2015; Lloyd et al., 2010). However, the time period that this research was collected over made it possible to investigate the role of ethnicity both pre- and post-legislation change. Ethnicity was dichotomized into Indigenous versus Non-Indigenous and the data file was stratified by this variable for analyses. First, generally, ethnicity was not found to generally play a role when considering the entirety of the data. Specifically, 80% of Indigenous individuals had DO designations and 83% of Non-Indigenous individuals had DO designations. As well, 67% of Non-Indigenous individuals had indeterminate sentences and 60% of Indigenous individuals had indeterminate sentences.

Second, penalty outcome pre-legislation change and post-legislation change and ethnicity was investigated and it was found that Indigenous individuals are no longer more likely to receive an indeterminate sentence post-2008 legislation change compared to pre-2008 legislation change. Only 49% of Indigenous individuals received an indeterminate sentence post-legislation change compared to 84% prior to the 2008 legislation change. However, it was found that Non-Indigenous individuals have not been affected by the 2008 legislation change with respect to penalty outcomes. It was found that Non-Indigenous individuals were just about as likely to receive an indeterminate sentence pre-legislation change (75%) versus post-legislation change (62%). Further investigation (discussed in the following section) into reasons for this significant finding were found to be driven by the province of Saskatchewan (whose DO applications are

almost entirely against Indigenous individuals) where judicial decision makers have imposed more determinate sentences with LTSOs than any other jurisdiction evaluated.

Third, in terms of designation outcome, the results indicate that neither Indigenous nor Non-Indigenous individuals have been impacted by the 2008 legislation change. It was found that 88% of Indigenous individuals received a DO designation prior to the legislation change and 77% received a DO designation after the legislation change. Moreover, 75% of Non-Indigenous individuals received DO designation pre-legislation change versus 88% post-legislation change. As noted previously, designation outcome is not considered the most informative outcome variable due to the 2008 legislation change placing less discretion for judicial decision makers at the designation stage. Therefore, the result would not be expected to be significantly different. That said, it is still concerning to see so many Indigenous individuals being designated DOs when they represent such a small proportion of the Canadian population.

Overall, ethnicity generally did not play a role in the two primary outcome measures, designation outcome and penalty outcome, particularly pre-2008 legislation change. In this regard, although there was a higher percentage of Indigenous individuals facing preventative detention applications (driven primarily by Saskatchewan), being assigned a DO designation, and receiving an indeterminate sentence compared to Non-Indigenous individuals, those overall percentages were unchanged post-2008 legislation change. However, one area where there was a notable change regarding ethnicity was with respect to the overall percentage of Indigenous individuals being sentenced to indeterminate incarceration post-2008 legislation change (driven primarily by Saskatchewan). And although it is positive that Indigenous individuals have a better chance at receiving a determinate sentence with an LTSO over an indeterminate sentence since the 2008 legislation change (as least in Saskatchewan), as noted, it remains concerning that 59% of the sample in this research were of Indigenous ancestry. Moreover, it is yet to be seen how many of these Indigenous individuals still end up with indeterminate sentences when they recidivate due to a lack of supports available in the community and the effects of stigmatization on multiple levels.

It is unclear if the legislation change was the sole reason for this result as there is likely other factors involved. That said, given that the results appear largely driven by Saskatchewan and as a province they bring forward considerably more preventative detention applications, not only generally, but also against Indigenous individuals per capita than any other province, given

the large shift post-legislation change in penalty outcomes, it is likely judicial decision makers are utilizing their discretion to the greatest extent possible under the law. Whatever the reason, the result is significant and compelling. Further factors that could have influenced the outcome include improved programming focused directly on Indigenous populations, considerations of an individual's Indigenous social history, and perhaps simply just a greater level of awareness and education within the judicial system regarding Indigenous history and reconciliation.

4.6 Jurisdictional Differences

Given that the current DO population is disproportionately distributed amongst jurisdictions, it was important to investigate jurisdictional outcomes. As seen in overall distribution of DOs by province, Saskatchewan has not only a disproportionate number of DOs, but a disproportionate number of Indigenous DOs, which continues to be represented by this research. Specifically, there were 50 cases pulled from Saskatchewan during the 10-year period and only 18 pulled from Manitoba in the same period. Given that these two provinces are not only similar in overall population (SK = 1.18M; MB = 1.38M) but also the percentage of population that is Indigenous (SK = 16.3%; MB = 15.5%), the number of cases presented for preventative detention in Saskatchewan very troubling (SK = 50; MB = 18). Moreover, a similar contrast can be seen between British Columbia and Alberta were there were 49 cases pulled from British Columbia and only 23 pulled from Alberta. Given that these two provinces are also similar in overall population (BC = 5.17M; AB = 4.44M) and percentage of population that is Indigenous (BC = 5.9%; AB = 6.6%), the number of cases presented for preventative detention is in British Columbia also troubling (BC = 49; AB = 23). When considering Saskatchewan brings forth the same number of preventative detention applications as British Columbia (who has over four times the population), it can be concluded that preventative detention applications are being overused in Saskatchewan.

Further jurisdictional analyses have also shown that there is a dramatic difference in the number of Indigenous individuals brought forward for preventative detention hearings. Specifically, even though both Saskatchewan and Manitoba have a greater proportion of Indigenous peoples in their populations, they bring a disporportionate number of preventative detention hearings against Indigenous individuals (SK = 84.0%; MB = 77.8%). However, a similar, but less extreme trend, is seen in Alberta and British Columbia wherein 43.5% and 32.7%, respectively, of preventative detention applications are brought against Indigenous

individuals, when only 6.5% (AB) and 5.9% (BC) of their populations are Indigenous. This appears to confirm prior research indicating that the provisions are being applied arbitrarily across jurisdictions, and is resulting in discrimination against specific groups of individuals (Bonta, Harris, et al., 1996; Grant, 1985).

The overuse of preventative detention applications in Saskatchewan has been a long-standing issue and is well-known amongst those who are involved in the judicial system. When the province has been questioned about why their rates of preventative detention applications are not only disproportionate in overall quantity but also with respect to Indigenous individuals, their response tends to focus on crime rates being higher in Saskatchewan and thus warranted. However, Manitoba is very similar to Saskatchewan in terms of population, overall percertage of Indigenous peoples, and crime rates, however, they brought 2.8 times fewer applications (18 vs. 50) in the same 10 year period and yet their crime rates have not increased incrementally as a result.

Moreover, it is also known that Saskatchewan employs a team of Crown prosecutors who only pursue cases that may be eligible for preventative detention. This approach appears out of the scope and purpose of the legislation as it is difficult to justify that individuals (including Indigenous individuals) are more "dangerous" in Saskatchewan than other provinces (particularly those with similar characteristics and populations). Moreover, Saskatchewan is targeting almost exclusively Indigenous individuals for preventative detention hearings. Finally, if the goal (as is noted in Saskatchewan), is to reduce crime, then there should be evidence of a decline in violent crime in Saskatchewan in the last decade; however, there is no evidence of same and in fact, there appears to be an increase in violent crime (Statistics Canada, 2021). It does not appear Saskatchewan has a valid reason for bringing forward so many preventative detention applications, particularly against Indigenous individuals. The true reasons will not ever likely be known, but the way in which Saskatchewan approaches preventative detention appears not just unjust but biased and discriminatory.

In regards to both designation outcome and penalty outcome, the 2008 legislation change did not influence the number of DO designations handed down by the provinces. All four provinces continued to assigned DO designations to between 77.6% and 87.0% of the individuals brought forward for preventative detention. Again, not surprising given the shift in discretion to judicial decision makers from the designation stage to the penalty stage. It is concerning,

however, that the vast majority of individuals brought forward for preventative detention are receiving special sentencing designations. One's odds of not receiving a designation if targeted, are low.

However, there was a significant jurisdictional shift seen with respect to the number of indeterminate sentences levied pre- versus post-2008 legislation change. Overall, Saskatchewan (52.0%) had the fewest indeterminate sentences levied, followed by British Columbia (61.2%), Manitoba (77.8%), and Alberta (78.3%). Moreover, when comparing the number of indeterminate sentences pre-legislation change versus post-legislation change, Saskachewan had the largest contrast (88.9% (pre) versus 31.3% (post)) for a difference of 57.0%. This was followed by Alberta (100.0% (pre) versus 70.6% (post) (29.4% difference) and British Columbia (68.8% (pre) versus 57.6% (post) (11.5% difference). Whereas in Manitoba the trend was in the opposite direction (66.7% (pre) versus 88.9% (post) (22.2% increase). Overall, regardless of percentage of overall population of Indigenous peoples in these provinces, there is a disproportionate number of Indigenous individuals facing preventative detention applications regardless of jurisdiction.

Moreover, the impact of the 2008 legislation change is seen more prominently in Saskatchewan, wherein judicial decision makers appear to be taking the opportunity to exercise their discretion in handing down determinate sentences with LTSOs as opposed to indeterminate sentences. Given the high proportion of Indigenous individuals brought forward for preventative detention applications in Saskatchewan, this trend towards determinate sentences with LTSOs (50/50 chance) should be regarded as the most favorable outcome without a shift in policy that dictates who prosecutors target for preventative detention hearings. That said, it is unknown how many of the DO determinate sentences with LTSOs will end up ultimately serving indeterminate sentences anyway, particularly in Saskatchewan.

The results further indicate that the 2008 legislation change does not appear be influencing British Columbia, Alberta, and Manitoba as significantly in terms of levying indeterminate sentences versus determinate sentences with an LTSO during the period investigated. However, Saskatchewan judicial decision makers appear to have adopted the 2008 legislation change to a substantial extent and this adoption of the 2008 legislation change is potentially what the federal government was hoping would occur, which is an opportunity for individuals who are "dangerous" under the law, to still have an opportunity to reside in a

community setting with appropriate supports. However, as previously discussed, it is unclear how many of these individuals will ultimately be successful in the community and ultimately end up with an indeterminate period of incarceration anyway.

Whereas Saskatchewan judicial decision makers appear to have adopted the 2008 legislation change to a large extent, the trend appears to show British Columbia and Alberta also starting to adopt the 2008 legislation change but at a slower pace. However, Manitoba appears to be moving in the opposite direction in that the overall percentage of DOs provided indeterminate sentences has actually increased since the 2008 legislation change. That said, it is unclear the reasons for the increase as Manitoba clearly brings forward less preventative detention applications overall and it may be that their selectiveness of cases may already be those that warrant an indeterminate sentence to be levied. This line of reasoning could also apply to British Columbia and Alberta. However, knowing that, as a jurisdiction, Saskatchewan has more than three times as many DOs than any other province per 100,000 population, it may be that because Saskatchewan prosecutors are not as critically selective about the individuals they present for preventative detention hearings, judicial decision makers are recognizing this and making the appropriate adjustments during the penalty stage (which is where their power lies).

In conclusion, when the effects of the legislation were investigated further in terms of jurisdictional trends, it was found that, of the four provinces explored, only Saskatchewan had a large shift in sentencing wherein they had an almost 50/50 split of DO indeterminates and DO determinates with LTSOs. The other three provinces further research will be required to determine if this is in fact the case as approximately half of the sample collected had index offences prior the legislation change and thus fell under the old legislation wording. That said, it is likely that there will eventually be an increase in the overall number of DO designations as the legislation change decreased judicial decision makers' discretion at that stage of the sentencing which now requires them to designate an individual as a DO (rather than an LTO) if they meet the legal criteria of a DO. In terms of the legislation as a whole, it can be said that the criteria are overbroad and have not actually decreased the number of individuals likely ultimately facing indeterminate incarceration.

Given that it is unlikely that preventative detention will be repealed or abolished any time in the future and these high risk, high need individuals fall under federal jurisdiction, an alternative to managing not only the jurisdictional discrepancies but the overrepresentation of

Indigenous individuals, would be to create a committee that contains a variety of forensic mental health and judicial professionals that would oversee the implementation of preventative detention in Canada. This would eliminate the provincial jurisdiction to directly bring forward applications, although the provinces could still submit possibilities to the committee for consideration. That said, the committee would be able to take a more clinical and evaluative approach to determine who should face a preventative detention hearing, thus reducing the amount of bias and discrimination that may be present. As well, perhaps the committee could work towards locating and building resources in the community for individuals potentially facing preventative detention.

4.7 Strengths and Limitations

There are some important strengths, limitations, and possible future directions with the present study. This study covered a significant period of time (i.e., 10 years) and also contained preventative detention hearings that took place both pre- and post-2008 legislation change in order to evaluate the impact, if any, of same. Moreover, although the sample contained 140 sentencing decisions from four Canadian provinces (British Columbia, Alberta, Saskatchewan, and Alberta) which allowed for a good representation (45%) of active DO between those four jurisdictions and approximately 37.5% of all active DOs in Canada, the overall sample was moderate in size and decreasing cell sizes in categorical analyses may have reduced the statistical power for some analyses. This could have led the analyses to potentially not be as highly informative if the judicial decision makers who take the time to detail the experts' testimony are distinct from other judges in important ways, which is in and of itself an additional limitation.

There are several limitations and delimitations to the following study, which parallel the limitations of similar studies (Blais, 2015; Blais & Forth, 2014; Lloyd et al., 2010). One major limitation is the nature of the data source; in particular, the gathering of experts' testimony is from judges' selective discussion in their judgments. There is recognition that additional expert written or oral testimony may have been important to the outcome even though there is no reflection in the coding; thus, it is difficult to make definite conclusions about experts' testimony that was misunderstood or consciously disregarded by the judges. Moreover, in most cases, it is unknown what was actually presented (in writing or orally) to judicial decision makers and thus whether the judicial decision makers made appropriate remarks regarding same. However, part of the goal of the study was to gather information about how judicial decision makers are

representing or interpreting expert risk assessment information and incorporating it into their final decision. Finally, it is unknown how much confirmation bias existed throughout the hearings or how much "lip service" was provided to particular areas without actual consideration being provided to those aspects.

Further, gathering judgments from the database which may have excluded cases is problematic, mainly because the characteristics of excluded cases are not known. As well, at times, it was found that there were a proportion of cases that had recorded appeal decisions but no accompanying original sentencing decision. Those cases were not included in this study as there was not enough information contained in the appeal decision to code the case. Moreover, restricting the analyses to the expert testimony submitted within the hearing leads to the possibility that the noted experts may not be representative of all experts that had an opportunity to interview the individual facing sentencing. However, if the testimony of the expert was persuasive enough, it is assumed inclusion in the written or oral decision will occur. Moreover, although all cases included, at a minimum, a Court-appointed expert as required by legislation, less than half included Defence expert reports and even fewer contained Crown-appointed experts. In some cases, there could be as many as four expert witnesses presenting evidence between various parties. This study was focused on the Court-appointed experts and any Defence retained experts and thus the other expert testimony was not included for analyses but it is acknowledged that expert testimony may have contributed to the ultimate outcomes.

Interestingly, although DOs have histroically been primarily individuals who commit sexual offences, the current sample indicates that half (51.0%) have sexual index offences and only approximately 55.7% have prior sexual convictions. Therefore, the results are likely more generalizable to other correctional samples (e.g., high need violent offenders) wherein risk assessments may be used in judicial or other processes due to more individuals committing violent offences now being presented for preventative detention hearings. Moreover, on average, this sample only had 1.8 prior sexual convictions. Additionally, this study only provided a legal snapshot of hearings wherein expert evidence is presented in regards to already high-risk, high need individuals as preventative detention hearings are directed at a very small group of individuals whose personal characteristics (e.g., antisocial personality) and particular circumstances (e.g., having committed a series of serious personal injury offences) place them in favor of preventive incarceration (Thompson, 2016). Moreover, this study is restricted to

Canada, as preventative detention legislation varies around the world, thus limiting the interpretation of the results globally. That said, the issues with respect to "dangerous offenders" in Canada are not unique and are seen globally.

There is a recognition that prior research has suggested to improve upon the limitations of the data source used in this study, including reviewing full transcripts of preventative detention hearings so that coding would not be as limited by the information judicial decision makers choose to include in their judgments (Lloyd et al., 2010). However, noting the most salient pieces of evidence that the judicial decision maker is utilizing in support of their decision are typically included in their written or oral submission (Welsh & Ogloff, 2008). Besides, the purpose of this study is to identify what is noted and how expert testimony is interpreted in the written or oral decisions by judicial decision makers, not the presentation in the written risk assessment or testimony during the hearing.

4.8 Conclusion and Future Directions

In conclusion, the present study examined the role of expert testimony and risk assessment (as interpreted by judicial decision makers), partisanship, ethnicity, jurisdictional differences, and the effect of the 2008 legislation change in preventative detention hearings between 2008 and 2018 in four Canadian provinces. Support for the role of experts in hearing outcomes continues to be supported, particularly in the areas of treatment amenability and risk management in the community, but also risk judgment (as interpreted by judicial decision makers). That said, the majority of the variance in outcomes stem from the penalty stage and not the designation stage; which is largely driven by the legal criteria set out in the Criminal Code. However, additional guidelines regarding risk assessments specific to preventative detention hearings, as well as operational definitions of inherently legal terms would likely further increase the utility and credibility of the experts' assessments throughout the judicial decision-making process.

Currently, it is difficult for expert witnesses to make the most conclusive statements in the areas of treatment amenability and risk management in the community as they remain largely subjective and there are no specific valid and reliable assessment instruments that can be used. Further, support for the positive impact of the 2008 legislation change was seen, particularly in Saskatchewan. It appears that in provinces where high proportions of preventative detention applications are brought, judicial decision makers appear to be utilizing the discretion granted to

them under the 2008 legislation change. That said, judicial decision makers are not needing to utilize the same discretion granted under the 2008 legislation change in jurisdictions who are more selective as to who they bring forward for preventative detention in the first place (e.g., the 'most dangerous and highest risk'). Indigenous individuals continue to be overrepresented (which was not expected to change as the legislation did not address them specifically) and Saskatchewan appears to be an outlier when it comes to not only the number of preventative detention applications brought forth but also their focus on Indigenous individuals, along with their application of the 2008 legislation change. That said, it would be prudent to have more prosecutorial oversight when it comes to preventative detention applications in order to combat not only the overrepresentation of Indigenous individuals, but the general overuse of the legislation in some provinces.

The knowledge garnered from this program of research helped bridge the gap between research evidence and the practice of risk assessment, particularly in preventative detention hearings. In order to effectively apply research regarding factors associated with risk assessment to sentencing decisions, it is imperative to understand what the judicial system, as judicial decision makers, view as important and useful in making sentencing decisions, and which risk assessment aspects they have been willing to support. It is hopeful that the information gathered will be used to inform policy makers and politicians in regards to preventative detention hearings and assist clinicians to write more clear and comprehensive reports. Results of this research may have implications for future policies, risk assessment strategies, training clinicians, and may encourage collaboration between researchers, the judicial system, and policy makers. Given the ongoing increase in DOs across the country, along with the stigmatizing effect of such a designation, it is crucial continued research be conducted with regard to preventative detention in Canada.

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APPENDIX A – CODING SHEET

Section 1 – Individual Characteristics

Case/Individual (LAST Name, First Name) _____
Date of Birth (YY-MM-DD): _____
Age at sentencing _____
Age at index ____
Ethnicity:
1 – Caucasian/White
2 – Indigenous/Aboriginal/Cree/Metis/Dene/Inuit (or any other classification)
3 – Other (any other classification noted)
4 – No ethnicity noted
Year of index:
1 – 2004 2 – 2005 3 – 2006 4 – 2007 5 – 2008 6 – 2009
7 – 2010 8 – 2011 9 – 2012 10 – 2013 11 – 2014 12 – 2015
13 – 2016 14 – 2017 15 – 2018 16 – 2019 17 – Other _____
Index offence:
1 – sexual number _____ offence(s): _____
2 – violent number _____ offence(s): _____
Number of prior convictions (including youth) _____
Youth record: 1 – yes 2 – no 3 – not mentioned/unknown
Age at first offence: ____
Prior sexual conviction(s):
1 – yes number _____
2 – no
Prior failure on community supervision:
1 – yes
2 – no
Education obtained (please note highest level achieved):
1 – grade 9 or less
2 – grade 10 to 12
3 – GED or equivalent
4 – post-secondary education or trade school
Gang affiliation: 1 – yes 2 – no
Substance use issues (any or multiple substances): 1 – yes 2 – no
Adverse childhood experiences (circle all that apply):
1 – abuse (any kind (circle all that apply) – sexual, emotional/psychological, physical)
2 – poverty (e.g., low socioeconomic status)
3 – witnessing violence (e.g., violence between parents or other adults)
4 – parental substance abuse (e.g., one or both parents)
5 – neglect (e.g., abandonment, basic needs unmet, lack of parental supervision)
6 – foster care (and/or involvement from social services)
Other experiences (circle all that apply):
1 – mental health issues/diagnoses (e.g., schizophrenia, bipolar, depression, anxiety, ADHD)
2 – cognitive issues/diagnoses (e.g., low intelligence, learning disorder, illiterate, FASD)
3 – personality disorder/diagnoses (e.g., Antisocial, Narcissistic, Borderline, Psychopathy)

Section 2 – Expert Characteristics and Content of Experts' Testimony Noted

Number of experts who completed risk assessments _____

Expert affiliation and credential (if more experts – please note):

1 – Crown/Court

1 – Psychiatrist Name: _____

2 – Psychologist Name: _____

2 – Defence

1 – Psychiatrist Name: _____

2 – Psychologist Name: _____

Actual risk assessment scales (the presence of an identified scale):

1 – Expert 1 (circle all that apply)

1 – VRAG 2 – PCL-R 3 – STATIC-99R

4 – HCR-20 5 – RSVP 6 – LSI-R

7 – SORAG 8 – VRS 9 – VRS-SO

10 – LS/CMI 11 – LS/RNR 12 – Other: _____

2 – Expert 2 (circle all that apply)

1 – VRAG 2 – PCL-R 3 – STATIC-99R

4 – HCR-20 5 – RSVP 6 – LSI-R

7 – SORAG 8 – VRS 9 – VRS-SO

10 – LS/CMI 11 – LS/RNR 12 – Other: _____

Expert and type of risk communication description (circle all that apply):

1 – Expert 1

1 – categorical (e.g., low, moderate, high, very high)

2 – narrative (e.g., description of instrument and outcome in words)

3 – percentiles (e.g., percentile rank)

4 – range (e.g., range of any description - ___ to ____)

5 – raw score (e.g., 27/30)

2 – Expert 2

1 – categorical (e.g., low, moderate, high, very high)

2 – narrative (e.g., description of instrument and outcome in words)

3 – percentiles (e.g., percentile rank)

4 – range (e.g., range of any description - ___ to ____)

5 – raw score (e.g., 27/30)

Expert and risk judgment:

1 – Expert 1

1 – very high 2 – high 3 – moderate-high 4 – moderate 5 – low

2 – Expert 2

1 – very high 2 – high 3 – moderate-high 4 – moderate 5 – low

Expert and treatment amenability judgment (e.g., capacity and/or willingness/motivation to engage in treatment/programming AND be successful):

1 – Expert 1

1 – very high (e.g., a very high chance at success and/or capacity or motivation)

2 – high (e.g., a high chance at success and/or higher capacity or motivation)

3 – moderate (e.g., some chance at success and/or some capacity or motivation)

4 – low (e.g., not much chance at success and/or little to no capacity or motivation)

2 – Expert 2
    1 – very high (e.g., a very high chance at success and/or capacity or motivation)
    2 – high (e.g., a high chance at success and/or higher capacity or motivation)
    3 – moderate (e.g., some chance at success and/or some capacity or motivation)
    4 – low (e.g., not much chance at success and/or little to no capacity or motivation)

Expert and risk management judgment:
1 – Expert 1
    1 – can be managed in the community (e.g., enough/available supports)
    2 – cannot be managed in the community (e.g., not enough/no available supports)
    3 – could be managed, but no (or not enough) appropriate supports available
2 – Expert 2
    1 – can be managed in the community (e.g., enough/available supports)
    2 – cannot be managed in the community (e.g., not enough/no available supports)
    3 – could be managed but no (or not enough) appropriate supports available

Expert and distinction made between static/historical and dynamic risk factors:
1 – Expert 1
    1 – yes (e.g., acknowledgement that static/historical factors are unchangeable – except age)
    2 – no (e.g., no acknowledgement that static/historical factors are unchangeable)
2 – Expert 2
    1 – yes (e.g., acknowledgement that static/historical factors are unchangeable – except age)
    2 – no (e.g., no acknowledgement that static/historical factors are unchangeable)

Expert and noted presence of dynamic factors (including personality) (e.g., motivation, cognitive distortions, insight, empathy, anger, emotion dysregulation):
1 – Expert 1
    1 – yes (e.g., a statement regarding dynamic (or changeable) factors)
    2 – no (e.g., no statement regarding dynamic (or changeable) factors)
2 – Expert 2
    1 – yes (e.g., a statement regarding dynamic (or changeable) factors)
    2 – no (e.g., no statement regarding dynamic (or changeable) factors)

Expert and noted presence of protective factors (e.g., areas of strength – community supports, no substance issues, employment, prosocial friends/associates, prosocial spouse/partner, no antisocial attitudes, no issues with emotion regulation, intelligent, insightful):
1 – Expert 1
    1 – yes (e.g., a statement regarding protective factors)
    2 – no (e.g., no statement regarding protective factors)
2 – Expert 2
    1 – yes (e.g., a statement regarding protective factors)
    2 – no (e.g., no statement regarding protective factors)

<u>Section 3 - Hearing and Written Sentencing Decision Characteristics</u>

Judge: _____

Jurisdiction: 1 – BC 2 – AB 3 – SK 4 – MB

Year of decision:

1 – 2008	2 – 2009	3 – 2010	4 – 2011	5 – 2012	6 – 2013
7 – 2014	8 – 2015	9 – 2016	10 – 2017	11 – 2018	

Level of court:

1 – Provincial 2 – Queen's Bench/Superior

Law referenced:

1 – new law (index post-July 2008) 2 – old law (index pre-July 2008)

Trial outcome information:

1 – DO 2 – LTO

Sentencing outcome:

1 – indeterminate 2 – determinate with a LTSO

Length of the determinate sentence (entire sentence): _____ months

Credit for time served _____ months

Length of the long-term supervision order: _____ months

Length of sentencing decision: _____ pages

Judge's perceptions of individual's risk:

1 – very high 2 – high 3 – moderate 4 – low

Judges' perceptions of treatment amenability:

1 – very high 2 – high 3 – moderate 4 – low

Judges' perceptions of risk management:

1 – can be managed in the community

2 – cannot be managed in the community

3 – could be managed in the community, but no appropriate (or not enough) support

Judges' overall reliability on experts' evidence:

1 – complete (e.g., the judge did not dispute any evidence presented)

2 – somewhat (e.g., the judge accepted some evidence and disputed some)

3 – dismissed (e.g., the judge did not agree with the expert evidence)

Judges' expression of a preference for one expert testimony over the others in cases with multiple experts (if more than two experts or both are psychiatrists and a preference, please note on the side):

1 – yes 1 – Expert 1 2 – Expert 2

2 – no 3 – not applicable as only one expert

Appeal – any notes regarding an appeal and, in particular, why the appeal was successful can be noted at the bottom of the page:

Appeal: 1 – yes 2 – no

Year of appeal: _____

Appeal Outcome: 1 – upheld 2 – overturned